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Clarence Belnavis Receives Panner Professionalism Award

By The Honorable John V. Acosta & Scott Hunt

Clarence Belnavis receiving award from Dennis Rawlinson

The Litigation Section honored Clarence Belnavis as the 2020 recipient of the Owen M. Panner Professionalism Award at its annual Litigation Institute and Retreat at Skamania Lodge.

Clarence is a partner at Fischer & Phillips LLP in Portland and a trial attorney with an emphasis on employment litigation.

U.S. District Court Magistrate Judge John Acosta and Scott Hunt of Busse & Hunt LLC have known Clarence for more than 20 years and introduced him at the awards ceremony. Judge Acosta practiced with Clarence at Stoel Rives and highlighted numerous accolades Clarence has received, including listings in *The Best Lawyers in America*, *Chambers USA*, *America's Leading Business Lawyers*, and *Oregon Super Lawyers*. Judge Acosta noted the various bar and civic organizations in which Clarence is actively involved, emphasizing Clarence's tendency to volunteer when asked and to contribute positively to any organization he joins.

"It bears special note," Judge Acosta said, "that Clarence, a black lawyer in a predominately white profession in our state and the first person of African ancestry to receive this award, has consistently displayed that high level of professionalism throughout those years, maintaining that professionalism when, on occasion, persons of lesser commitment and integrity might not have."

Scott got to know Clarence by litigating employment cases against him. Despite that adversarial relationship, Scott was impressed with Clarence's integrity and consistent professionalism. Scott described serving with Clarence on the Labor & Employment Section executive board and observing Clarence's ability to work cooperatively and collegially with members on "both sides of the v." Scott said Clarence treats staff, colleagues, clients and opposing counsel with respect and places a high importance on family.

Clarence accepted the award by fondly remembering his interactions with Judge Panner. Clarence described his efforts to develop relationships with opposing counsel to help ease the litigation process and ultimately lead to positive results for his clients. The humility and honor Clarence deeply felt in receiving the award were evident in his remarks.

Founded in 1998, the award is named for the late U.S. District Judge Owen M. Panner and recognizes Oregon lawyers and judges for outstanding professional qualities, reputation and conduct. Dennis Rawlinson presented the award to Clarence at a banquet attended by many prominent members of the profession, including the 2019 Panner Award recipient, Senior U.S District Court Judge Anna Brown.

The Right to a Jury Trial in the Time of COVID-19

By Janet Hoffman
Janet Hoffman & Associates LLC

Editor's Note: This article represents the legal analysis of Janet Hoffman and is not intended to reflect the official position of the Litigation Section or of the Oregon State Bar.


Janet Hoffman

A jury trial is an iconic image. After selection, twelve impartial jurors are seated together in a jury box to observe the litigants, witnesses, and the court. In turn, the litigants observe the jurors, monitoring their presentations to respond to the jurors' reaction. During breaks, the jurors retire to a small jury room where they interact. Advocates address the jury in opening and closing arguments, standing close – but not too close – to present their case, all the while trying to maintain credibility not only through their understanding of the facts and law, but also through facial expressions, body posture and tone of voice. From the jury box, jurors get an up-close chance to observe the testimony of witnesses who take the stand and present their direct testimony and then turn their attention to opposing counsel's cross examination, closely watching the reactions of trial counsel and the litigants as the witnesses responds to questions. Throughout the trial, jurors monitor the court's reactions. At the conclusion of the trial, following closing arguments and final jury instructions, the bailiff is sworn in and returns the jury to the jury room for deliberation where the jurors become a single entity "the jury" and render their verdict based their individual understanding of the evidence honed by the collective process of deliberation. The jury system fundamentally assumes that each juror has an equal opportunity to observe the entire court process.

With the pandemic defining our new normal and changing the way we convene, it is difficult to visualize a group of individuals who would not be anxious about the prospect of serving as a juror. They have valid concerns about their health and safety and the health and safety of their loved ones. Health experts agree outdoor activities are safer than indoors, it is important to restrict the size of gatherings, masks keep people safer, avoid public restrooms and maintain at least six feet of social distance between individuals. It is now understood that even loud conversations in closed rooms present elevated health risks.

Overlaid on these concerns are the statutory and constitutional rights, both federal and state that define the requirements of a "fair and impartial jury." The challenge facing litigants and the courts today is how to reconcile the constitutional mandates with the legitimate health concerns facing jurors. This begs the question: Can a defendant obtain a fair and unbiased jury trial of one's peers in today's current crisis?

Legal Standards

The current orders issued by the Governor and the state Supreme Court do not resolve the constitutional or statutory issues presented by a defendant's right to a fair and impartial jury trial. Both the Governor and the Supreme Court issued Orders designed to protect the health and safety of the general population and, specifically as to the later order, allow the courts to function during the pandemic. The Governor extended Oregon's current State of Emergency through Sept 4. Although restrictions have been eased in some counties, general procedures to protect against the spread of infection are in place as counties have reopened and individuals have returned to greater social interaction. On May 15, the Oregon Supreme Court issued Chief Justice Order no. 20-016 (the order) imposing restrictions on jury trials. The goal of the order is "to meet the courts obligations to the public while continuing to minimize health risks for judges, staff, litigants and case participants . . ." The order recognizes some criminal defendants will insist on jury trials before the September 4th date based on their constitutional and statutory rights to a speedy trial. According to the order, jury trials during this time at a minimum will require the following: social distancing, specified persons in the court room wear masks (excluding witnesses when testifying) and other reasonable precautions to protect the health of all participants. Once the State of Emergency is lifted, the state courts will set protocols for holding jury trials.

The governor's restrictions and the court's order are both laudable in that they enact safeguards meant to keep individuals in each courtroom protected from transmitting the virus during court proceedings. However, these procedures must still meet a standard of higher import: the Oregon and US Constitutions.

Enshrined in Article I of the Oregon Constitution is the right to a jury trial in both criminal and civil cases. The criminally accused is also guaranteed the right to a speedy trial under Article I, Section 10 of the Oregon Constitution, which states, "no court shall be secret, but justice shall be administered, openly and without purchase, completely and without delay…" The Sixth Amendment to the United States Constitution guarantees a defendant the right to a speedy trial by an impartial jury. Under Oregon law, absent a waiver from the accused, misdemeanor trials must be commenced within two years from the date of filing the charging instrument, and felonies must be commenced within three years. ORS 135.746. If trials are not commenced within that time (absent specific exceptions) the case will be dismissed. ORS 135.752. Oregon law also contains the "60-day rule," which requires criminal defendants to be released from custody after a maximum of 180 days. It is this 60-day rule which is driving the court to hold jury trials during this time of emergency.

Under both the Oregon and United States constitutions a criminal defendant has a fundamental constitutional right to call witnesses on her own behalf and confront the witnesses called by the state. Face-to-face confrontation is central to this right. *See* Article 1 Section 11 of the Oregon Constitution; *State ex rel. Juv. Dept. v. S.P.*, 218 Or. App. 131, 178 P.3d 318 (2008); see *also* the 5th and 6th Amendments to the United States Constitution; *Maryland v. Craig*, 497 U.S. 836 (1990).

Just as fundamental, both constitution's guarantee the right to a fair trial which includes the ability to remove jurors for cause, identifying those who cannot judge a case fairly through voir dire. Individual history or attitudes that impact an individual from fairly deciding the case before them will disqualify them as a juror if they have such a fixed attitude of mind that it would control their action in some appreciable degree. *See State v Humphrey*, 63 Or. 540, 54 (1912). A failure to excuse a biased juror will result in a new trial. *Lambert v. Sisters of St. Joseph*, 227 Or. 223, 231 (1977).

Provisions and Orders Addressing Health Concerns of Jurors May Impact Their Impartiality

It's a safe assumption that potential jurors are concerned about their health and safety. Jury trials and the physical layout of courtrooms work against the current safeguard of social distancing and would enhance potential juror's anxiety about contracting the novel coronavirus. Members of the public place safety even above their own financial interests. A poll published on April 2nd by the Kaiser Family Foundation found that 8 in 10 people surveyed believed the government should prioritize slowing the spread of the coronavirus over protecting the economy. Kaiser Family Foundation, *The Impact of Coronavirus on Life in America*. Apr. 2, 2020. Similar attitudes were expressed in a non-partisan statewide survey of 900 Oregonians conducted between April 17 and 21. The public opinion firm DHM Research, partnering with Oregon Values and Beliefs Center, found that 82 percent of Oregonians either strongly or somewhat supported the stay-at-home order. Those surveyed held that opinion despite the fact that 40% had either lost a job or had their hours cut due to COVID-19 and the Governor's order. More recent surveys have found that similar attitudes persist even after several months of social distancing orders. *See e.g.* Liz Hamel et al., *Coronavirus: Reopening, Schools, and the Government Response*, KFF (Jul. 27, 2020), https://www.kff.org/coronavirus-covid-19/report/kff-health-tracking-poll-july-2020/; Czeisler et. al., *Public Attitudes, Behaviors, and Beliefs Related to COVID-19, Stay-at-Home Orders, Nonessential Business Closures, and Public Health Guidance*, 69 MMWR Morb. Mortal. Wky. Rep., 751 (2020).

These findings appear to reflect core values or fixed beliefs of potential jurors. It logically flows that they would also value their own safety over their civic duty to give defendants a fair trial. This concern for safety could manifest in hostility towards the accused or the entire jury trial process. Certainly, potential jurors' concerns about their physical safety and attitude towards the safety measures -- or lack thereof -- could create sufficient bias such that they must be excused.

Pursuant to the Governor's executive orders and incorporated into the Chief Justice's order, social distancing requires individuals to maintain a minimum of six-foot distance from one another. In order to "minimize health risks," Orders from the Governor and guidance from the CDC make clear wearing masks in public is a matter of personal and societal safety and recommend avoiding public restrooms and quarantining if an individual has been in close proximity with someone who becomes ill with coronavirus. Governor Kate Brown's reopening orders turn on reducing the rate of Covid infection, limiting the size of gatherings, social distancing and mask wearing. *See* https://govstatus.egov.com/or-covid-19.

Individuals have been warned against large public gatherings. Therefore, a prerequisite to holding a fair jury trial is to ensure that none of the participants are infectious. A questionnaire sent to court staff, potential jurors and litigants that asks about a description of any symptoms and contact with anyone who may be infected does help mitigate fears, but that is certainly not dispositive as to whether or not a health risk is presented. Research indicates that some infectious individuals are asymptomatic and for those who do show symptoms they are most infectious during the two days before they show symptoms. He, X., Lau, E.H.Y., Wu, P. *et al.*, *Temporal dynamics in viral shedding and transmissibility of COVID-19*, 26 Nat. Med. 672 (2020). The Chief Justice's order concerning jury trials requires the adoption of "reasonable precautions to protect the health of all participants . . ." While testing is the best security against infection, even assuming access to tests it may not be a reasonable requirement to place upon a prospective juror. A potential juror could refuse to take the test and would therefore be automatically eliminated from the pool of jurors. For those who consented, sharing the results could potentially violate HIPAA regulations. However, it could be argued that in order to protect the litigants and other jurors, the entire jury pool should be tested before jury selection. But even these efforts would ultimately be futile. In cases where a trial lasts more than one day, the initial tests given during jury selection will not protect against subsequent exposures, nor inform other individuals in the courtroom of that exposure. The weakness in our ability to screen for Covid presents heightened anxiety for prospective jurors.

Impact of Current Health Data on a Fair and Impartial Jury Trial of One's Peers

Jurors will undoubtedly be anxious about congregating in large numbers in public spaces. Their anxiety is reasonable. They will face risk of exposure to the virus throughout their jury service including transportation to the courthouse, security lines to enter the courthouse, exposure to large numbers of strangers and working in close proximity to others. Parents of school age children will also be concerned about home schooling and supervision of their children until schools reopen.

These health concerns create a significant risk that jurors will not represent our general population. Large numbers of otherwise qualified jurors will potentially exclude themselves from jury duty simply based on age, underlying health risks, and their status as parents. Research has also shown that COVID-19 disproportionately impacts black/African American and Hispanic communities. Garg *et al.*, *Hospitalization Rates and Characteristics of Patients Hospitalized with Laboratory-Confirmed Coronavirus Disease 2019*, 69 MMWR Morb. Mortal Wky Rep., 458 (2020). These disparities will prevent many defendants from being judged by a jury of their peers. Even if a jury can be selected, it is virtually impossible to impose standard health precautions within our current courtrooms and trial system. The witness stand is generally situated in close proximity to the jurors and court reporters. The jury boxes are often too small to allow for social distancing, so jurors will be required to spread throughout the

courtroom. Those sitting behind counsel table will not be able to observe the defendant during trial other than staring at his or her back, nor will they see the face of counsel. They will experience the trial remotely and will gather a fraction of the information that they are presented in comparison to jurors sitting in the jury box. Disputes about evidence will occur in instances when some jurors didn't have an opportunity to make an initial observation. Therefore, the jurors' exposure to the evidence presented in the courtroom will be different. Take, for example, a witness who identifies the defendant from the witness stand. The jurors sitting in front of the counsel's table will be able to see the defendant's reaction and may judge the validity of the identification based on watching both the witness and the defendant. Those behind counsel will miss this portion of the identification and will be unable to contribute regarding this point during deliberations, thus depriving the defendant of full jury participation.

Assuming these known challenges – and the myriad unknown challenges before us – are somehow overcome and a group of jurors is chosen and a system is developed that includes picking a significant number of alternates to guard against mistrials based on changes of juror's health profiles, how do we maintain the public nature of criminal jury trials. Oregon courts are constitutionally required to allow open courtrooms, which means public access. What ability does the judge have to require the health of members of the public be evaluated before entering the courtroom? The courts are currently set up to prevent weapons being brought into court rooms, but they are not historically involved in protecting the health of trial participants from potentially infectious members of the public who have a constitutional right to watch the proceedings and vice versa.

The Chief Justice's order states "[a] presiding judge may: require that specified persons in the courtroom, excluding witnesses when testifying, wear masks . . ." Although there is no current scientific study as to the physiological impact on jurors of individuals in a courtroom wearing or not wearing masks, logically it will affect the proceeding. To some, mask wearing has become a sign of social respect or showing concern for others. A failure to don a mask may be seen as dangerous or irresponsible behavior. To others, masks have become a symbol of an overbearing government. In the current times, masks in and of themselves remind individuals they are facing potential health risks. Despite the potential ramifications to the justice served in each case, masks have been incorporated into the jury trial system as a safety precaution against the spread of a potentially deadly disease.

Further, a criminal defendant unbeknownst to themselves may be infected with COVID-19. Jails, prisons and other state confinement facilities have been linked to a number of outbreaks across the country. However, requiring a defendant to wear a mask in court would certainly put them at a disadvantage by creating a de-humanized jury reaction and may even make him or her look guilty. Courts may only compel defendants to briefly don masks for the narrow purpose of eyewitness identification in limited situations. *United States v. Domina*, 784 F.2d 1361 (9th Cir. 1986). Otherwise, the visual effect of seeing the defendant in a mask potentially creates a prejudicial impression of guilt in jurors' minds. For similar reasons, defendants cannot be compelled to appear at trial in prison garb. *Bentley v. Crist*, 469 F.2d 854 (9th Cir. 1972). Requiring a defendant to wear a mask for the entirety of a trial would be an unprecedented step. Similarly, jail guards who transport and in-custody defendant and remain in the court room during the trial would potentially be required to wear a mask, thus raising a sense of menace in the courtroom. As of May 20th, 1,259 jail guards in New York alone have been infected with novel coronavirus and there have been 6 deaths. *See* New York Times May 21, 2020.

As for witnesses, a witness may not be required to wear a mask. However, what if they are uncomfortable not wearing one? What if jurors view a witness not wearing a mask as disrespectful behavior and, therefore, distrust the witness? What about the mandate that courts use reasonable precautions to protect the health of all participants? Recent studies have determined that a high risk of spreading germs occurs in closed rooms with little air circulation. Speakers exhale germs when they speak and wearing a mask is the best defense against infection. *See e.g.* Stadnytskyi *et al.*, *The Airborne Lifetime of Small Speech Droplets and their Potential Importance in SARS-CoV-2 Transmission*, PROC. OF THE NAT. ACAD. OF SCI., May 13, 2020; Hamner, *et al.*, *High SARS-CoV-2 Attack Rate Following Exposure at a Choir Practice*, 69 MMWR MORB. MORTAL WKLY. REP. 606 (2020). Therefore, it is a safety consideration whether witnesses are required or allowed to wear masks in a courtroom.

While it may be a safeguard to illness, at the same time requiring a witness to wear a mask conflicts with a defendant's constitutional rights to confront a witness face to face. Witnesses may certainly be reluctant to testify in public courtrooms for the same reason that jurors would be reluctant to serve. They may also insist that they wear a mask. Will courts allow witnesses to wear masks for their own protection or the protection of jurors and others in the courtroom? Doing so would certainly impact the defendant's right to face their accusers. Although there have been constitutional challenges involving witnesses wearing religious garments and situations where the government has obscured a portion of a witness's voice or facial identification for their protection, these issues have been tied to a single witness in a trial and other witnesses were not impacted. In each case, there must be a specific countervailing reason to make a limited exception. *See e.g. United States v. De Jesus-Castaneda*, 705 F.3d 1117 (9th Cir. 2013) (witness was an active confidential informant in the Sinaloa cartel); *People v. Ketchens*, No. B282486, 2019 Cal. App. Unpub. LEXIS 3920 (June 7, 2019) (witness had a First Amendment right to wear a thin veil covering the lower portion of her face).

The very idea of every witness hiding the lower part of their face, including their mouths, from the jury is anathema to our court system. We all take cues from non-verbal communication that come with reading facial expression. We watch for grimaces, smiles, and down-turned lips to understand the meaning speakers place on their words. Uniform jury instructions advise jurors to judge credibility based in part on the demeanor of the witness. *See* Ninth Circuit Manual of Model Jury Instructions –

Crim. 3.9 (2019); Or. UCrJI No. 1006. A mask would prohibit jurors from undertaking this central function.

A suggested alternative that witnesses appear via Zoom or similar technology during criminal trials also presents inherent problems. Video testimony is not a substitute for appearing in person. It interferes with the ability of jurors to judge the truthfulness and value of a witness's testimony to their decision-making process. Germaine to this topic is a New York Times article of April 29, 2020, entitled "Why Zoom is Terrible." The article explains the common situation where individuals have a negative emotional reaction to those they are interacting with on Zoom. Although in some ways counterintuitive, the way the technology decodes and reconstructs data creates subliminal artifacts and inaccuracies in the pictures and responses that make individuals "feel vaguely disturbed, uneasy and tired without quite knowing why." These responses would certainly prejudice a defendant's right to a fair and impartial jury trial. That kind of subliminal response cannot be guarded against and would impede the fair delivery and processing of information. Currently, Oregon courts will not permit or force a party to accept video testimony. Prior to its admission both parties must stipulate to it. ORS 131.045; *United States v. Carter*, 907 F.3d 1199 (9th Cir. 2018) (witness's pregnancy did not justify use of two-way video).

The usual tactics of cross-examination, curative jury instructions, and expert testimony also cannot mitigate these problems. No lay witness could explain why they are unable to connect with the jury over video, nor can jurors be instructed to separate their automatic psychological reactions from their legitimate credibility assessments. Experts may be able to explain the reaction, just as they can explain the potential unreliability of eyewitness identification. *State v. Lawson*, 351 Or 724, 761 (2012). However, this only stands to undermine jurors' confidence in the entire system, not provide defendants a fair trial

Conclusion

Legitimate health concerns facing jurors and other trial participants puts the constitutional right to a speedy trial at odds with the ability to have a fair and impartial jury and to confront one's accusers face-to-face. Defendants may refuse to waive their speedy trial rights because they need or want their trials heard now as they are currently in custody and are concerned about their own health and safety during this time or are anxious about a trial hanging over their heads. Courts are rightfully concerned about maintaining public health and safety, but are also concerned about backlogs in trial dockets rising during this pandemic. Balancing all of these concerns with the constitutional rights of the accused will be difficult, if not impossible. As U.S. District Court Judge Jed Rakoff, who sits in Manhattan, writes, "if well past July and for months to come, it is still dangerous for twelve people to gather together in tight quarters to hear and determine civil and criminal cases, it is not easy to see how the constitutional right to a jury trial will be genuinely met." Jed Rakoff, *Covid & the Courts*, The New York Review of Books, Apr. 30, 2020. Thus, in moving towards reopening our judicial system, we must not rush towards resuming jury trials in their normal manner without taking the time to appropriately address and consider a

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defendant's constitutional rights. Each safety measure adopted by the court potentially impacts different components of what together constitute a fair and impartial jury trial. A defendant who insists on a speedy trial would first need to waive the other constitutional rights that will be given up in exchange for enforcement of that single right. For those who want to quickly and safely resume jury trials, it is important to understand that efforts to ensure courtroom safety will risk infringing on constitutional rights that are integral to our system of jurisprudence and fundamental to the rights of the accused.

Comments From The Editor

Unconscious Effective Practices

By Dennis P. Rawlinson
Miller Nash Graham & Dunn LLP


Dennis P. Rawlinson

One of the most important but often least effective components of a trial presentation is the direct examination of expert witnesses. It is unusual these days when a trial or arbitration presentation does not include direct examination of at least one expert. Completing such a direct examination is not difficult, but it is rarely done effectively and persuasively.

Set forth below for your consideration are some suggestions for the framework of the direct examination of an expert.

The Tickler

For two to three minutes, when an expert first takes the stand, he enjoys a few golden moments when he has the fact-finder's full attention, and so do you as his direct examiner. Instead of spending the first 15 minutes of testimony on a litany of the background and qualifications of the expert and encouraging the court or jury to daydream or grow bored, ask two or three initial questions that tell the fact-finder who the expert is and why he is there. For instance:

Q. Doctor, can you tell us what kind of doctor you are?

A. Yes, a neurologist.

Q. Is a neurologist a doctor skilled in the diagnosis and treatment of diseases of the nervous system?

A. Yes.

Q. And have you come here today to explain to the fact-finder (court or jury) your diagnosis and treatment of the damage to plaintiff's nervous system caused by the accident?

In short, within the first two to three minutes, make it clear to the fact-finder who the expert is and what he or she will be talking about.

Adding the Power of Persuasion to the Tickler

A tickler can be a powerful tool of persuasion. Here's why and some explanations and three alternative examples of how to use them for your consideration.

Example 1

Psychologists, who study such things, have concluded that the average human has an attention span of 30 to 45 seconds. This means that if you try to focus on an inanimate object such as a pencil on a desk and the object does not move or change, your attention will wander from the pencil after 30 to 45 seconds. Once you realize how limited a jury's attention can be, you should consider ways to keep and recapture the jury's attention.

One of the most challenging portions of a trial to successfully accomplish while retaining the jury's attention is setting the foundation to qualify an expert witness as an expert. The process can be mind-numbingly boring. For example:

1. Doctor, where did you go to medical school?
2. Doctor, where did you do your residency?
3. Doctor, where did you do your internship?
4. Doctor, what is your specialty?
5. Doctor, do you have related subspecialties relevant here?

Talk about a sing-song-boring direct. Simply mind numbing! The jury is gone. Their minds are elsewhere—three minutes into the direct exam!

Instead of the direct exam, the jury is thinking about their favorite sports team, where they want to go on vacation, what they need to buy at the grocery store, what they will fix for dinner—anything but your boring direct exam.

Once you have lost the jury's attention, it is difficult to recapture it.

Worse yet, you are in a race with the other side to communicate and have the jury adopt your theme as their own rather than adopting your adversary's theme. How do you capture and keep or recapture the jury's attention for this purpose?

Assume you are handling a medical malpractice case. You know that 80 percent of such jury cases result in jury verdicts for the defendant because most of us like our personal doctors, believe they have a hard job, and therefore give wide latitude for medical judgment.

As a result, your theme and case must not be gray but must be black and white. That is, it must not be subject to multiple interpretations but it must establish a universal truth so the defendant doctor cannot hide behind the medical judgment rule to escape liability.

You stress that due to the doctor's performance of a drastic and dangerous procedure called an angiography, your client is paralyzed over half of her body. Many others undergoing this procedure do not survive.

What is the black and white theme? What is the underlying truth of the case?

"Ladies and gentlemen, this is a case about a drastic and dangerous medical procedure that should have never been performed!" (Simple. Short. Easy to remember).

First, angiographies by their nature are drastic and dangerous. A catheter tube and wires are inserted into an artery at the groin, moved up and down (like a plumber checking the plumbing of a home with a snake) and threaded through the artery until its tip reaches the segment of the vessel to be examined and then a dye is injected and X-rays are taken.

But during the up and down, plaque can be released from the sides of the artery. If that happens, the plaque will be carried to the brain and can cause death or paralysis, often permanent paralysis.

It is a drastic and dangerous procedure.

The rule is that such a drastic and dangerous procedure is undertaken only if less invasive procedures indicate a serious problem. In this case, six or seven less invasive tests indicated no serious problem. Moreover, our client was a lifelong smoker who likely had plaque built up in her arteries, making her far more vulnerable than most to plaque dislodging and traveling to the brain to cause death or paralysis.

You want to get these strong points across early in your direct before the jury loses its limited attention span. Thus the tickler might be conducted as follows:

Q. Doctor, this is a case about the performance of a drastic and dangerous procedure, is it not?

A. Yes. (Nodding.)

Q. Doctor, why is it drastic and dangerous?

A. Expert witness explains catheter and wires inserted into artery and pulled back and forth like a plumber using a snake and brute strength to clear a pipe.

Q. Doctor, under what conditions would such a drastic and dangerous procedure be performed?

A. Most, if not all doctors, would conclude, it should only be performed if several non-invasive tests show there is a serious problem.

Q. Doctor, were non-invasive tests performed here?

A. Yes.

Q. Doctor, how many?

A. Six or seven.

Q. Doctor, did any show a problem?

A. No.

Q. Doctor, was there any justification you could see here for performing such a drastic and dangerous procedure as an angiography?

A. No.

Q. Doctor, what is the first rule of medicine that students are taught in medical school?

A. Do no harm.

Q. What does that mean?

A. Do not undertake a highly drastic and dangerous procedure such as this one unless less invasive tests indicate it is necessary.

Q. Did you conclude the procedure here was highly drastic and dangerous?

A. Yes.

Q. Should it have been performed?

A. No.

Q. Now let's discuss your medical background, medical school, internship, residency, and past experience to see how you came to the conclusions you did here.

Example 2

Is there a risk that a judge who routinely allows three or four tickler questions may not allow six ticker questions as in the example above? Sure! But the judge may allow them, particularly if there is no objection or if this is an arbitration with more lenient evidentiary rules. Know your judge. It is usually worth the risk because if you are asked to move on at this point in the direct exam of the expert, you can return later. Moreover, you can emphasize you are being forced (to what will seem arbitrary) to return later by introducing the earlier exam and repeating it a second time for even more emphasis.

1. Doctor, do you remember when the defendant's lawyer objected earlier to the questions relating to the drastic and dangerous nature of an angiography?
2. Doctor, let's return to those questions now and learn what the defendant did not want the jury to hear.

Example 3

If you believe your judge will not allow a tickler the length of the above example or if you do not want to use the technique of returning later in your direct to cover what adverse counsel did not want the jury to hear, consider a shorter tickler such as:

Q. Doctor, are you here to testify about a dangerous and drastic procedure?

A. Yes.

Q. Should it have been performed?

A. No.

Q. Why?

A. It violated the first rule of medical treatment, "Do no harm."

Qualifications

In federal court, curriculum vitaes and résumés are generally admitted into evidence. In state court, they are admitted by certain judges and upon stipulation by the parties. If you have the opportunity to do so, save precious examination time by introducing the vitae.

It is preferable to cover only the highlights of the expert's qualifications (which will relate directly to his or her specific opinion) during direct examination and leave the rest of the general background for the fact-finder to obtain from the cur-

riculum vitae. This, of course, means that the curriculum vitae should be reviewed and edited so that it becomes self-explanatory and persuasive and so that extraneous matters are deleted.

Nothing encourages the fact-finder's mind to wander more than 20 minutes of detailed background questioning of an expert that has little to do with his or her opinion in a specific case. An effective discipline is to limit the expert's qualifications to no more than five minutes or no more than 10 to 15 questions (depending on the expert and the case). Consider covering only the vitae's highlights and select those highlights for their relevance to the opinion in the particular case.

Lead with the Opinion

Unlike lay witnesses, who seem to be most believable when they explain the factual basis for their opinions before they give an opinion (e.g., the symptoms of drunkenness as perceived by the witness before the opinion of drunkenness), expert opinion is more powerful if the opinion is given before its basis.

To begin with, if the opinion is held back until a lengthy explanation of the basis is given, the opinion itself may be lost as the fact-finder's mind wanders. Accordingly, if your expert is going to give three opinions, you should consider having the expert give all three opinions early in his or her testimony in a succinct, systematic manner and explain after each opinion that you will come back to it and explain the basis and procedure in arriving at it.

Such an approach ensures that even if a fact-finder pays attention to only the opening ten minutes of the examination, the fact-finder will understand who the expert is, why he is there, and what his opinions are.

Explain the Basis for the Opinion

In my experience, the most persuasive expert testimony is the expert testimony in which the basis for the opinion is well organized, understandable, and succinct.

It is often helpful to use an overhead projector or a chalkboard to list the points or the procedures as the expert testifies about them to reinforce them and demonstrate their interrelationship.

The expert must use common, everyday language—not jargon. The best experts use picture words and analogies, just as the best lawyers use them in a closing argument.

Prepare for Cross-Examination

An often-overlooked but important component of any direct examination of an expert is to have the expert undercut the adversary's anticipated cross-examination by explaining away in his or her own words the points that you believe he or she will be asked on cross-examination. Such a preemptive strike, particularly at the end of the direct examination and just before cross-examination is to begin, may convince your adversary to either abandon the proposed line of cross-examination or risk wearing out the fact-finder's patience by covering purported weaknesses, which you have already shored up on direct examination.

Conclusion

One thing I have learned about direct examination is that it may not be as exciting as cross-examination, opening statement, and closing argument, but it is usually the battlefield on which cases are won or lost.

It is a constant challenge to turn the direct examination of an expert into an entertaining and attention-demanding presentation. You may want to consider the above-listed suggestions the next time you conduct the direct examination of an expert. Experience has taught me that no matter how accomplished your direct examination of an expert may be, it can always be made better.

After the Supreme Court's Decision in *China Agritech*, a Plaintiff Who Seeks to Represent a Class Should Not Wait to File

By Cody Berne
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One of the first questions you ask when evaluating a case is when the statute of limitations begins to run. With class action tolling, the answer is not always straightforward.

The U.S. Supreme Court decision *China Agritech, Inc. v. Resh*, U.S. 138 S Ct 1800, 201 L Ed 2d 123 (2018), resolved the open question whether, upon denial of class certification, class action tolling applies to the filing of a subsequent class action. In a 9-0 decision, the Court answered "No." Only subsequent individual claims—not claims by a plaintiff seeking to represent a class—are tolled.

China Agritech clearly applies to federal claims in federal court. But until the scope of the case is clarified, *China Agritech* all but requires a plaintiff who is considering whether to represent a class with any type of claim in state or federal court to assume that there will be no tolling of class claims. The typical class action takes many months or even years to reach a decision on class certification. Class members may have both federal- and state-law claims, but for several reasons, such as strategy or case management, the class plaintiffs may not plead all the possible class claims, particularly state law claims. Without tolling, the statute of limitations will continue to run as to later-filed class action cases, and subsequent class actions may be precluded even before the court determines whether to grant or deny class certification.

Class Action Tolling Before *China Agritech*

American Pipe & Constr. Co. v. Utah, 414 US 538, 553, 94 S Ct 756, 38 L Ed 2d 713 (1974), established that the timely

filing of a class action tolls the statute of limitations for anyone in the putative class who, upon denial of class certification, seeks to intervene. *American Pipe* tolling applies to a plaintiff who files an individual suit before a decision on class certification.

In *Crown, Cork & Seal Co. v. Parker,* 462 US 345, 350, 103 S Ct 2392, 76 L Ed 2d 628 (1983), the Supreme Court extended *American Pipe* tolling to putative class members who file individual actions brought after a denial of class certification. This means that a plaintiff who files an individual action—as opposed to intervening in the original action—still benefits from tolling. *American Pipe* and *Crown, Cork* left open the question whether the tolling rules also apply to subsequent class action claims.

China Agritech Limits Class Action Tolling

The lawsuit at issue in *China Agritech* was the third class action on behalf of purchasers of the defendant company's stock. *China Agritech*, 138 S Ct at 1805. The plaintiff alleged securities fraud claims under a federal law, the Securities Exchange Act of 1934. The relevant statute of limitations was two years from discovery of the facts underlying the claim. 138 S Ct at 1804.

The first complaint against the defendant company was filed within the statute of limitations. A little over one year later, the district court denied class certification. Five months after that, but still within the statute of limitations, a new set of plaintiffs filed a second class action. The district court again denied class certification. *China Agritech*, 138 S Ct at 1805.

A new plaintiff then filed a third class action complaint, i.e., the third separately filed class action complaint against the same company based on the same allegations. Unless the previous cases provided for tolling, the third case was filed a year and a half after the statute of limitations had run. The district court dismissed the third complaint, holding that the previously filed complaints did not toll the statute of limitations for class claims.

The Ninth Circuit reversed, explaining that tolling "would advance the policy objectives that led the Supreme Court to permit tolling in the first place." *Resh v. China Agritech*, Inc., 857 F3d 994, 1004 (9th Cir 2017). Tolling "promotes economy of litigation by reducing incentives for filing duplicative, protective class actions." *Id.* Although not mentioned in the Ninth Circuit's opinion, tolling also protects the right of a putative class member to represent the class in the typical case in which absent class members are unaware that a class action is pending. *See China Agritech*, 138 S Ct at 1813-14 (Sotomayor, J., concurring in the judgment).

The Supreme Court granted certiorari to resolve a circuit split as to whether to toll the statute of limitations for otherwise-untimely successive class action lawsuits. *China Agritech*, 138 S Ct at 1805. In reversing the Ninth Circuit, the Supreme Court concluded that the "efficiency and economy of litigation that support tolling of individual claims do not support maintenance of untimely successive class actions." 138 S Ct at 1806 (internal quotation marks and citation omitted). The Supreme Court advised that, "any additional class filings should be made early on, soon after the commencement of the first action seeking class certification." *Id.* This way, the district court "can select the best plaintiff with knowledge of the full array of potential class representatives and class counsel." 138 S Ct at 1807. And the class certification decision "will be made at the outset of the case, litigated once for all would-be class representatives." *Id.*

The *China Agritech* rule appears to favor a defendant, but a "defendant may prefer not to defend against multiple actions in multiple forums." *Crown, Cork*, 462 US at 353. As the Supreme Court recognized, "[m]ultiple timely filings might not line up neatly; they could be filed in different districts, at different times—perhaps when briefing on class certification has already begun—or on behalf of only partially overlapping classes." *China Agritech*, 138 S. Ct. at 1811. But the Court concluded that "district courts have ample tools at their disposal to manage the suits, including the ability to stay, consolidate, or transfer proceedings." *Id.*

Whether the Ninth Circuit is correct that it is more efficient to minimize the need for protective class actions or the Supreme Court is correct that it is more efficient to have trial courts manage multiple class actions remains to be seen, and securities fraud class actions, such as *China Agritech*, may not be the best example.

On the one hand, many nonsecurities class action cases follow the class action procedures codified in the federal securities laws. These procedures provide plaintiffs with an incentive to file early because the securities laws require public notice of filing and relatively expedited appointment of a lead plaintiff and lead counsel. 15 USC § 78u-4(a)(3)(A)(i)(B)(i). This happens before class certification.

On the other hand, in most federal securities class actions, there are a few class members, primarily state entities, who can also assert claims under state law or in state court. *China Agritech* does not address the possible complexities that arise when a case asserts federal claims for the class as a whole but does not raise state claims that may exist for only a portion of the class. The state law class action claims may become important to some class members, particularly if the first case is not certified as a class action. *China Agritech* also does not state whether its rule applies to future class action claims under state law or in state court. Further, *China Agritech* does not appear to limit *Smith v. Bayer Corp.*, 564 US 299, 318, 131 S Ct 2368, 180 L Ed 2d 341 (2011), which held that a federal court could not enjoin a state court from certifying a class in a case brought by plaintiffs who were not parties to the federal case and were not bound by the result in the federal case.

Class Actions After *China Agritech*

Before *China Agritech*, a potential plaintiff who had notice that he or she might be a member of a class in a putative class action had to decide whether to: (1) file an individual action; (2) intervene in the pending class action; (3) file another class action, making the same claims or additional claims, such as under state law; or (4) do nothing. At some point, after notice to the class, the potential plaintiff also had to decide whether to opt out of the class action. After *China Agritech*, a potential plaintiff still has the same options. But if bringing an individual action is not realistic—because a lawyer will not take the case or for some other reason—a potential plaintiff who

is considering filing a class action must now predict whether a pending putative class action will adequately protect his or her rights and ultimately be certified as a class action. This assumes, of course, that the potential plaintiff is aware of the class action in the first place.

A potential plaintiff must also consider the adequacy and typicality of the named plaintiff and whether unique defenses or facts make it unlikely that the trial court will certify a class. In many cases, the answers to these questions are unclear. Deciding how to proceed when a plaintiff is not a party is especially challenging without discovery and with the prevalence of protective orders and confidentiality agreements that purport to limit the right of putative class members to access discovery.

Plaintiffs and defendants must also still evaluate whether some other rule or right affects the statute of limitations analysis. Rules governing when a claim is discovered for statute of limitations purposes can be factually and legally complicated. Further complications or possibilities are created by the relation-back rules in Fed R Civ 15(c) and ORCP 23 C. For example, could a new plaintiff intervene in the case and assert new class claims that relate back to the original filing date? Plaintiffs also sometimes rely on a continuing-violation theory to extend the time that wrongful conduct is actionable or damages are recoverable. *See e.g,. Klehr v. A.O. Smith Corp.*, 521 US 179, 189, 117 S Ct 1984, 138 L Ed 2d 373 (1997) (explaining that under antitrust law, each overt act that is part of the violation, such as each unlawfully high priced sale caused by price-fixing, restarts the statute of limitations); 29 USC § 1113 (statute of repose in ERISA action for breach of fiduciary duty runs from "the last action which constituted a part of the breach" or "the latest date on which the fiduciary could have cured the breach"). In addition, courts sometimes apply equitable principles to toll the statute of limitations.

China Agritech and Your Case

The very limited number of reported decisions have applied *China Agritech* broadly and not always with much substantive analysis. *See Fierro v. Landry's Rest. Inc.*, 244 Cal Rptr 3d 1, 13, 17 (Ct App 2019) (applying *China Agritech* to state law claims in state court); *Torres v. Wells Fargo Bank* No. CV 17-9305-DMG (RAOx), 2018 WL 6137126, at *4 (CD Cal Aug. 28, 2018) (relying on *China Agritech* in wage-and-hour case, and rejecting argument that differences between state and federal class action certification rules support tolling); *Addelson v. Commonwealth Limousine Serv., Inc.*, No. SUCV20144061H, 2018 WL 6728396, at *2 (Mass Super Ct Nov. 7, 2018) (applying *China Agritech* to state law claims in state court and to withdrawn class claims after conditional certification denied).

China Agritech could apply to at least six types of class actions:

1. claims under federal law in federal court;
2. claims under state law in federal court based on diversity or supplemental jurisdiction;
3. claims under state law in federal court based on the Class Action Fairness Act of 2005 ("CAFA");
4. state law claims in state court;
5. claims based on another state's laws in state court; and
6. claims involving cross-jurisdictional tolling in which courts in one jurisdiction are asked to toll the statute of limitations based on a class action filed in another jurisdiction.

China Agritech explains that if your case falls under the first scenario—federal claims in federal court—the filing of a class action does not toll the statute of limitations for a subsequent class action. But even in these cases, watch out for claims based on federal law in which a federal court may borrow a state statute of limitations. For example, under 42 USC § 1988(a), a federal court will borrow a state statute of limitations for certain civil rights actions brought in federal court under federal law, which may or may not mean also borrowing a state law tolling rule that differs from the rule in *China Agritech*.

Under the second scenario, before *China Agritech* federal courts generally applied state statutes of limitations to claims in federal court based on diversity jurisdiction. *Guar. Tr. Co. of N.Y. v. York*, 326 US 99, 110, 65 S Ct 1464, 89 L Ed 2079 (1945). The general approach should also apply to state law claims in federal court because of supplemental (sometimes called pendent) jurisdiction. Consider, however, that *China Agritech*, 138 S. Ct. at 1810, states that plaintiffs "have no substantive right to bring their claims outside the statute of limitations." *American Pipe* tolling is a court-created rule that "does not abridge, enlarge, or modify any substantive right." *Id. China Agritech* did not answer whether the new tolling rule also applies to state law claims in federal court. Under *Guaranty Trust* and the *Erie* doctrine, federal courts might still apply state statutes of limitations tolling principles in these cases. Or federal courts might not. *See, e.g., Torres*, 2018 WL 6137126, at *4 (applying *China Agritech* to state law claims in federal court).

As to the third scenario—state law claims in federal court due to CAFA—whether the tolling rule is based on *China Agritech*, a state tolling rule, equitable tolling, or no tolling at all is a tricky question. Under CAFA, federal courts have jurisdiction over most class actions in which there is minimal diversity (any class member, whether a named plaintiff or not, has diverse citizenship from any defendant) and the aggregate amount in controversy exceeds $5 million. 28 USC § 1332(d). CAFA also applies to certain "mass actions." At least for a mass action removed under CAFA, the limitations period on any claims asserted in the mass action should be tolled while the mass action is pending in federal court. 28 USC § 1332(d)(11)(D). But *China Agritech* could be read to apply to a class action case in federal court under CAFA. Or, under *Guaranty Trust* and *Erie*, a federal court could look to state limitations rules.

In the fourth scenario, in which a plaintiff brings state claims in state court, at least in Oregon, courts should not apply *China Agritech*. ORCP 32 N tolls the statute of limitations for all class members "upon the commencement of an action asserting a class action." The statute resumes running: (1) "[u]pon filing of an election of exclusion"; (2) if a class certification order excludes a plaintiff; (3) if the court refuses to certify a class; or (4) if the lawsuit is dismissed without an adjudication on the merits. ORCP 32 N(1)-(4). The filing

of an individual action is not likely equivalent to a "filing of an election of exclusion," so an Oregon plaintiff who files an individual action after an Oregon class action is filed but before class certification should be able to rely on ORCP 32 N tolling. ORCP 32 N also does not limit tolling to individual claims, so a subsequent class action in Oregon state court should benefit from tolling of the statute of limitations by an earlier-filed class action in Oregon. *See Migis v. AutoZone*, Inc., 282 Or App 774, 803-04, 387 P3d 381 (2016) (declining to review trial court's decision to toll the statute of limitations), *adh'd to in part on reconsideration*, 286 Or App 357 (2017). There also is no limitation in ORCP 32 N that would bar a plaintiff from seeking to rely on ORCP 32 N to toll the statute of limitations in a case involving cross-jurisdictional tolling, i.e., tolling based on a prior case in another jurisdiction.

In the fifth scenario, for a claim in Oregon state court under the laws of another state, the analysis begins with Oregon's borrowing statute—ORS 12.430 (claims based on the law of another state)—that sometimes applies the limitations period from another state to claims brought in Oregon. *See also* ORS 12.440 (if the statute of limitations of another state applies, that state's laws about tolling and accrual also apply). If a claim is substantively based on the law of another state, the other state's limitations period applies. ORS 12.430(1)(a). Or if a claim is substantively based on the law of more than one state, the limitations period of one of those states applies, as determined by a conflict-of-law analysis. ORS 12.430(1)(b). If the other state has a pre-*China Agritech* practice of applying federal tolling rules, then *China Agritech* might not apply. But if the Oregon court determines that the other state's limitations period "has not afforded a fair opportunity to sue upon, or imposes an unfair burden in defending against the claim," then Oregon's limitation period applies. ORS 12.450; *see also* ORS 12.430(1).

Finally, if a case involves cross-jurisdictional tolling, there is a chance that *China Agritech* controls. Again, cross-jurisdictional tolling refers to cases in which a court is asked to toll the statute of limitations based on an action filed in another jurisdiction. The first question to ask is whether your forum even recognizes cross-jurisdictional tolling. If it does, the next question to ask is what the limitations and tolling rules in the forum are and how they are applied in cross-jurisdictional cases. If the forum recognizes equitable tolling, you should also consider whether this could apply. But if the forum that provides the limitation rules follows federal tolling rules, then *China Agritech* likely controls.

Conclusion

China Agritech resolved the open question of whether class action tolling under federal law extends to subsequent class actions. If there is risk that a class will not be certified or that the passage of time will limit the number of potential class members or potential additional class claims, a plaintiff who seeks to represent a class has one more reason after *China Agritech* to file sooner rather than later.

Be All That You Can Be in the Age of "Robolawyers"

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No trial lawyer can win every case; not even Artificial Intelligence ("AI") robolawyers can.[1] What is likely closer to the truth, as estimated by Edward Bennett Williams who represented notable clients including Jimmy Hoffa, Frank Sinatra, Hugh Hefner and the Reverend Sun Myung Moon, is that 1/3 of all cases can never be won, 1/3 can never be lost, and it's the battle over the remaining 1/3 that makes or breaks a trial lawyer's reputation.[2]

However, each of us knows trial lawyers where even that estimation is not met. What highly successful trial lawyers share as their secret is that it takes intense dedication to their clients, significant time and effort to learn facts and legal issues relevant to their cases, and creativity and the art of persuasion to present their clients' stories to jurors in an understandable, compelling manner . . . with a human connection.

In the past year, more than 10 major law firms have "hired" Ross, a bot or "virtual attorney" powered in part by IBM's Watson AI that performs legal research. Ross has the abilities to understand questions in ordinary English and provide specific analytic answers.[3] Ross does the dreary work, and we can imagine that he efficiently does so.

In 2016, an 18-year-old British coder developed the DoNotPay app, a parking ticket bot that handles ticket appeals through question-and-answer chat.[4] The app, which is available free online and easier to access for clients, has successfully appealed $3 million worth of tickets and saved drivers the cost of a lawyer, which apparently runs $400-$900.[5] DoNotPay also assists with payment-protection insurance claims.[6]

How will trial lawyers continue to feel useful in this emerging market of robolawyers?

As "trial lawyers" many of us already suffer from impostor syndrome, trying on average maybe one case a year – at best. Are we truly meaningful trial lawyers? Are we litigators? Are we easily fungible and replaceable by a computer? I land with the notion that (unlike computers) we can all find the best in ourselves and strive for excellence as we help people solve

problems, advocating and using the right to a jury trial. This will lead to becoming a great trial lawyer, an unparalleled professional who will never be endangered by AI.

Being a trial attorney vs. a litigator: a state of mind in an active-duty role.

Now, let's be blunt about what we really do each day. First, are we more a trial lawyer or litigator gathering information and pushing paper? The answer depends upon how we define each, which is more a function of one's state of mind rather than time invested in each particular task. This reflects our approach to cases, even more so than how many trials we have had in the last 10 years. A trial lawyer, I believe, is slightly but meaningfully different than a litigation lawyer, whose primary focus is pretrial matters.

In many ways, being a trial lawyer is something akin to the state of mind of being an active-duty soldier. We prepare for war, learn how to be effective at active duty, but may never actually go to war or only rarely be deployed during the course of a lifelong career.

Active duty is a full-time job. You must be ready at all times. Active-duty soldiers are ready and committed to serve 24 hours a day, 7 days a week, for the length of their service commitment. And, soldiers can be on active duty and not be deployed; but they aren't deployed unless they are on active duty. Similarly, in our legal world active duty means being prepared and committed at all times to serve our clients for the length of the case, and our "active duty" prepares the case for "deployment"—actual trial of the case. If we do not work the case accordingly, successful deployment is not possible.

The path of trial lawyers is not one of comfort and convenience. Most trial lawyers whom I have shared stories with agree that the trial lawyer's path doesn't become smoother or less uncertain over time. The passage of time instead brings higher stakes and more complex cases and challenges.

Experienced trial lawyers often take more time to prepare for trial than they did when they started out doing smaller personal injury cases. Opposing counsel and their corporate or larger entity clients are becoming increasingly sophisticated. And whether you represent or oppose those clients, as a trial lawyer, you are on active duty. Not just by waking up in the middle of the night with legal arguments, strategies or connecting facts, all those ideas we jot down next to our beds, but we also need to be on-duty for many other obvious reasons. If we have an opportunity to connect with a witness at an ill-timed call, then we need to seize the moment before the witness changes his or her mind about coming forward. If we have to file a timely motion or respond to a motion filed against our client while we have other pressing matters in our lives, then we have to be on-the-ready.

When we make this commitment to our client, we inevitably sacrifice other parts of our lives. Trial lawyers, like emergency room surgeons, combat soldiers, politicians, firefighters, breaking news journalists, are just one of those professions that if we want to strive for excellence it is likely not conducive to quality of life in all other ways.

We dedicate our careers to crafting stories, and like the soldiers who live stories, both are often centered around themes of survival. Our brains are hardwired to stories, and we share them to learn how to survive in the world. Our very means of survival over time has been generated by stories telling us how to survive against predators, how to help children be healthy and spawn the next generation, how to tell good from bad.

For the same reasons we don't want drones and computers to control wars, we should appreciate all we bring to being trial lawyers living and breathing as multi-dimensional humans. The human factors of determining what is analyzed, evaluated, reevaluated, and responding to facts with emotions are equally (if not more) valuable to decision-making than an algorithm of up and down, logical yes and no decisions in our business of problem-solving.

What we contribute as humans is layered. There is a feedback loop of concentric circles starting with what we get from being a trial lawyer. The most meaningful satisfaction of being a trial lawyer is striving for excellence through intrinsic motivation, not merely external motivations. That is the most foolproof way to overcome burnout. (Admittedly, computers don't risk suffering burnout). It also helps us be our best selves in advising our clients from a human perspective.

The role of a trial lawyer can have significant meaning, from plaintiff wins that can propel social change, to personal meaning for our clients, to our setbacks for ourselves that can often teach us far more. Being a trial lawyer does not mean just efficiently bringing closure to a conflict. The far greater meaning lies in dedicating ourselves to the best possible outcome for our clients and through finding meaning and excelling throughout the journey. It is the quality of the journey that often leads to development in the law and societal changes.

Great trial attorneys strive for excellence of creating an "A" paper, not just caring about getting the grade of an "A" on the paper.

For many in law school, litigation is a natural progression. Everyone is a litigator in some ways.[7] And apparently the market is swamped with countless litigators with world class qualifications and law firms far less interested in trial attorneys/litigators than those who want to practice in other areas.[8]

Maybe it's a subtle difference to many, but knowing our strengths and where we want to develop our talents, be it as a good trial *lawyer* or a good *litigator*—requires honest reflection.

To be a good litigator, you need to be very good at preliminary matters: identifying the applicable law, developing persuasive legal arguments, drafting strategic motions, preparing persuasive briefs, presenting persuasive oral arguments to judges, and winning your motions.

To be a good trial lawyer: you need to be very good at constantly discovering the facts to piece together the story of what happened. Great trial lawyers are great teachers and students. Great trial lawyers have to be bookishly nerdy with the law, not just regurgitating elements of claims, but need to artfully weave their client's story into the law. We need to be good writers but also be able to persuade during oral communications. We need to be able to strategically plan out our case, but also be able to think on our feet and spontaneously respond. Most importantly, throughout the life of the case we need to build the compelling stories that we share in final form at trials hopefully in a way that persuades jurors.

As either a great litigator or trial lawyer, we have to be not just efficient with our time, but more importantly give certain matters more weighted value, and then we need to be tenacious and creative in our legal quest for the best analysis given the facts of our case. We need to be an outstanding negotiator but also know when we need to guide our clients to settle. We need to be able to obtain quality clients whom we want to dedicate our time to, and then build those clients into our business in a manner that pays our bills to keep on the lights.

We must master the details of our case, without losing perspective of the big picture. We must do this in a way that does not simply take low-hanging fruit of typical issues or elements for the type of case, but instead identifies the unique issues under the specific facts of our precise case. It is vital to understand the foundational underlying facts, while still focusing on the high-level, forest tree-line. Discovery really involves both. Marcel Proust stated that "the real voyage of discovery lies not in seeking new landscapes but in having new eyes."

Being a trial lawyer is one of the tougher jobs in the legal sector. We are surrounded by deadlines making it a minefield for missteps, we are thrown into fight mode through motions, and we are required to have a range of skill sets. (I would welcome a robolawyer for the deadline minefields—that would be an exceptional tool.)

We have chosen a challenging yet enriching career but what lies ahead for this meaningful profession and for the Constitutional right to a jury trial if we focus on mere efficiency and actuarial odds?

Litigators are more likely replaceable by good AI than are trial lawyers– but there is no imminent threat to either.

Let's get out of the way the punch line. Those who are well-versed in AI and the law, conclude there is little threat to replace trial lawyers with AI so far.[9] And, setting aside important policy discussions about the "Uberization" of the legal profession that may likely be triggered in our future by companies like Avvo, and setting aside more classic debates about automation of any labor force on a macro level, I do find value in reflecting on what parts of our job are more human and why it is critical to who we are.

In order to find meaning and strive for excellence in what we do, it is helpful to reflect on how we each contribute as trial attorneys to the best human interests of our trial system.

Unlike AI, we need to determine WHY we do what we do. Are we externally motivated or internally motivated? As a trial lawyer, if one is mostly externally motivated, then there may not be enough there to keep you going when the going gets tough.

We are in an era of big data.[10] We need to ask ourselves, why can't AI replace us? If *the* goal is efficiency, then AI may well be *the* answer. And, perhaps our industry in many ways

is ripe for disruption. From a purely analytical view it makes sense. A computer would be faster than a human in objective, analytical tasks. However, from a more sociological, psychological and anthropological view—we are safe in our role as human trial lawyers even in the face of increasing technology.

A Brief History of Legal Technology[11]

- 1970: The first scholarly work considered the application of AI to the legal practice is published.
- 1973: Lexis launches its digital legal research service.
- 1977: Westlaw introduces a feature that helps determine whether a case can be used as valid precedent.
- 2006: Former legal counsel for Expedia, Mark Britton, founds Avvo, a digital service that matches people with lawyers.
- 2010: iJuror becomes available as an app which claims to help lawyers make best decisions during jury selection.
- 2014: A team at Michigan State's law school develops an algorithm that accurately predicts 70 percent of Supreme Court decisions made between 1953 and 2013. (Sounds quite similar to one-third of all cases will win, one-third will lose, and one-third are where we set our reputation.)
- 2018: DoNotPay app developed by teenager Joshua Browder claims it is the "world's first robot lawyer" which allows you to fight corporations and beat bureaucracy and sue anyone at the press of a button. Designed to dispute parking tickets and other small matters, through a list of questions, it expanded to offer more complex legal services after the Equifax scandal.[12]

Last year, McKinsey Global Institute found that while nearly half of all tasks could be automated with current technology, only 5% of jobs could be entirely automated, and estimated that 23% of a lawyer's can be automated.[13] While technology will transform multiple aspects of legal work, legal experts predict highly paid lawyers will spend their time on the top rungs of the "legal ladder," working on tasks with higher level cognitive demands. Non-lawyers or technology will perform the more routine legal services.[14]

AI may change the way we make decisions, the way big data has changed many industries, employing machine derived predictions as a complement to human judgment. However, what will need to be tested is whether there are predictions involving all human elements of how the particular chess moves between two trial lawyers unfold, how the witnesses will decide to testify, how juries will respond to particular trial lawyers and the stories crafted, etc. Big data, for instance, has failed miserably in the education arena, only part of which is reducing critical thinking and love of learning with standardized tests and bubble filling.

Certainly as AI develops, robolawyers can perhaps address unmet legal needs in simple, discrete areas the way TurboTax helps with simple accounting tasks.[15] But for the finer points of law and the human elements, there is no replacing us quite yet.

Where AI will be tough to imagine being useful is in situations where opposing counsel's unique personalities, and witnesses who are loose cannons, and juries who each have their own calculus all live as humans in imperfect unpredictable ways. Sure, AI can do pattern recognitions, but that isn't useful in all types of law or all contexts, certainly less so in many trial lawyer contexts.

It is the programmers who matter, and who will they be?

Whatever AI tools we use in the coming decades, trial lawyers creativity in legal arguments, human connections and our emotional intelligence is likely irreplaceable.

It is rational to conclude that as an evolutionary matter, our feelings preceded and gave birth to our thoughts.[16] This may explain why many are not so good at logic—apparently 90% of us fail the elementary Wason selection task—and rigorous calculations.[17] In the incisive "Life 3.0: Being Human in the Age of Artificial Intelligence," Max Tegmark, a Swedish American, cosmologist and physics professor at M.I.T. who co-founded the Future of Life Institute, suggests that thinking isn't what we may think it is:

> "A living organism is an agent of bounded rationality that doesn't pursue a single goal, but instead follows rules of thumb for what to pursue and avoid. Our human minds perceive these evolved rules of thumb as *feelings*, which usually (and often without us being aware of it) guide our decision making toward the ultimate goal of replication. Feelings of hunger and thirst protect us from starvation and dehydration, feelings of pain protect us from damaging our bodies, feelings of lust make us procreate, feelings of love and compassion make us help other carriers of our genes and those who help them and so on."[18]

It seems hard to imagine robolawyers, robojudges or robojuries replacing our judgment and what makes us feel human. It is impossible for all of us in the judicial systems to strip ourselves of feelings, which guide thinking. Embracing that which makes us human will make us great trial lawyers and advocates of a judicial system that should merely use AI as a tool.

Endnotes

1 "In a landmark study, 20 top US corporate lawyers with decades of experience in corporate law and contract review were pitted against an AI. Their task was to spot issues in five Non-Disclosure Agreements (NDAs), which are a contractual basis for most business deals. The study, carried out with leading legal academics and experts, saw the LawGeex AI achieve an average 94% accuracy rate, higher than the lawyers who achieved an average rate of 85%. It took the lawyers an average of 92 minutes to complete the NDA issue spotting, compared to 26 seconds for the LawGeex AI. The longest time taken by a lawyer to complete the test was 156 minutes, and the shortest time was 51 minutes." https://hackernoon.com/20-top-lawyers-were-beaten-by-legal-ai-here-are-their-surprising-responses-5dafdf25554d.

2 https://studylib.net/doc/8815811/the-five-habits-of-highly-successful-trial-lawyers-by--g.

3 https://www.theatlantic.com/magazine/archive/2017/04/rise-of-the-robo-lawyers/517794/ Brief aside: did Ross have to take the bar exam? Is he actually licensed to practice? Will he have to carry malpractice insurance? Perhaps those are topics for another day.

4 https://www.washingtonpost.com/news/innovations/wp/2016/05/16/meet-ross-the-newly-hired-legal-robot/?noredirect=on&utm_term=.7e97e831cad8.

5 *Id.*

6 *Id.*

7 https://www.bcgsearch.com/article/900047509/Why-Most-Attorneys-Have-No-Business-Being-Litigators-Fifteen-Reasons-Why-You-Should-Not-Be-a-Litigator/.

8 https://www.bcgsearch.com/article/900047509/Why-Most-Attorneys-Have-No-Business-Being-Litigators-Fifteen-Reasons-Why-You-Should-Not-Be-a-Litigator/.

9 https://abovethelaw.com/2018/12/artificial-intelligence-is-it-really-a-threat-to-us-lawyers/.

10 "Big data refers to the idea that society can do things with a large body of data that that weren't possible when working with smaller amounts. The term was originally applied a decade ago to massive datasets from astrophysics, genomics and internet search engines, and to machine-learning systems (for voice-recognition and translation, for example) that work well only when given lots of data to chew on. Now it refers to the application of data-analysis and statistics in new areas, from retailing to human resources." https://www.economist.com/the-economist-explains/2014/04/20/the-backlash-against-big-data.

11 https://www.theatlantic.com/magazine/archive/2017/04/rise-of-the-robo-lawyers/517794/.

12 https://abovethelaw.com/legal-innovation-center/2018/10/12/donotpay-is-the-latest-legal-tech-darling-but-some-are-saying-do-not-click/.

13 https://www.lawtechnologytoday.org/2018/02artificial-intelligence-wont-replace-lawyers-it-will-free-them.

14 https://www.lawtechnologytoday.org/2018/02artificial-intelligence-wont-replace-lawyers-it-will-free-them.

15 https://www.theatlantic.com/magazine/archive/2017/04/rise-of-the-robo-lawyers/517794/.

16 https://www.newyorker.com/magazine/2018/05/14/how-frightened-should-we-be-of-ai.

17 *Id.*

18 *Id.*

Mandamus Petitions for Adverse Discovery Rulings

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Over the course of your litigation career, you may eventually encounter a discovery ruling that violates existing law and, to salvage your case, you need to remedy the error before final judgment. Oregon law does not provide an interlocutory appeal mechanism to challenge discovery orders in civil cases, so options are limited.

A motion for reconsideration may be possible, but such motions are often frowned upon or even prohibited by the supplemental local rules. See Multnomah County SLR 5.045; Deschutes County SLR 5.045; Jefferson and Crook Counties SLR 5.045. The alternative is a writ of mandamus, but the writ process can be confusing and intimidating. The goal of this article is to help litigators decide when a writ of mandamus can help with adverse discovery rulings.

What is a writ of mandamus?

Under ORS 34.110 and Or Const, Art VII, § 2, the Oregon Supreme Court may issue writs of mandamus to inferior courts to compel acts that are required by law. Framed slightly differently, a writ's *only* purpose is to enforce established rights and duties imposed by the law. *State ex rel. Dewberry v. Kulongoski*, 346 Or 260, 267 (2009).

Mandamus is an extraordinary remedy with unique pleading and practice requirements.

As particularly relevant to the discovery context, mandamus is not available when (1) litigants have an adequate remedy on appeal or (2) the trial court's ruling is discretionary. Mandamus is not available when there is "a plain, speedy and adequate remedy in the ordinary course of the law." ORS 34.110. Although an appeal takes longer than a mandamus action, the availability of an appeal is ordinarily considered plain, speedy, and adequate enough to satisfy ORS 34.110. *State ex rel. Auto. Emporium, Inc. v. Murchison*, 289 Or 265, 269 (1980).

Writs of mandamus cannot "control judicial discretion." ORS 34.110. That said, where a judicial ruling violated the law—*i.e.* where the trial court committed "a fundamental legal error" by exceeding the permissible range of discretionary choices—the Court may issue a writ of mandamus because the trial court's ruling was not a valid exercise of discretion. *State ex rel. Keisling v. Norblad*, 317 Or 615, 616 (1993); *Lindell v. Kalugin*, 353 Or 338, 347 (2013) (quoting *Norblad*, 317 Or at 616); *see also Riesland v. Bailey*, 146 Or 574, 578–80 (1934) (fuller discussion).

When is mandamus appropriate for adverse discovery rulings?

If an adverse discovery ruling constitutes a "special loss beyond the burden of litigation" or has certain "systemic implications," then mandamus may be appropriate. *Murchison*, 289 Or at 269; *State ex rel. Anderson v. Miller*, 320 Or 316, 324 (1994). Special losses include "irreparable injury" and "irretrievable loss of information and tactical advantage" that cannot be restored on appeal. *Longo v. Premo*, 355 Or 525, 532 (2014). Being forced to litigate and appeal are not considered special losses without other factors. *State ex rel. Auto. Emporium, Inc. v. Murchison*, 289 Or 265, 269 (1980).

That kind of special loss often arises in the privilege context, as the following examples reflect:

- *Frease v. Glazer*, 330 Or 364, 373–74 (2000) (based on the crime-fraud exception to the attorney-client privilege, the trial court ordered an *in camera* inspection of privileged documents. The Supreme Court issued a peremptory writ preventing the inspection because the plaintiff did not show enough evidence that the crime-fraud exception to the attorney-client privilege applied);
- *Hodges v. Oak Tree Realtors, Inc.*, 363 Or 601, 604 (2018) (trial court ruled deposition answers were not protected by the physician-patient privilege. The Supreme Court issued a peremptory writ declaring the exception did not apply and plaintiff could assert the privilege);

- *State ex rel. Anderson v. Miller*, 320 Or 316, 318 (1994) (trial court entered a protective order preventing depositions from being videotaped, but the Supreme Court issued a peremptory writ vacating the order because there were no factors justifying the circuit court's order under ORCP 36(C)(1).

Mandamus is uniquely capable of addressing the recognition or denial of privileges. *Longo v. Premo*, 355 Or 525, 532 (2014) (It is well established that "disclosure of privileged information may cause irreparable injury."). Though the attorney-client and physician-patient privileges may be the most commonly asserted privileges in civil litigation, no doctrinal reason exists why other established privileges (including self-incrimination, spousal, and clergy-penitent privilege) would not also be mandamus-worthy. Simply put, any time your client loses a discovery battle involving a privilege, consider whether a mandamus petition is a possible avenue.

Additionally, the Court is willing to issue writs of mandamus where the parties can identify *systemic implications* from a discovery ruling or where a party has suffered a *special loss, irreparable injury*. Examples include:

- *Ransom v. Radiology Specialists of Nw.*, 363 Or 552, 554 (2018) (trial court denied plaintiff's motion to compel the defendant physicians to answer certain deposition questions that generally implicated their medical expertise. The Supreme Court issued a peremptory writ requiring the defendants to answer because the questions did not actually call for expert testimony;
- *State ex rel. S. Pac. Co. v. Duncan*, 230 Or 179, 180 (1962) (trial court ordered a corporate defendant to produce its train conductor and engineer for depositions under a statute permitting managerial employee depositions. The Supreme Court issued a peremptory writ disallowing the depositions because the employees were not "managers" under the statute);
- *Gwin v. Lynn*, 344 Or 65, 67 (2008) (circuit court denied motion to compel an expert witness to be deposed as a fact witness for matters of personal involvement. The Supreme Court issued a peremptory writ permitting such discovery because nothing in ORCP 26(B)(1) prevented it.)

Ultimately, the Court is a practical body that cares about preventing waste and setting forth clear law to follow. The Court take cases that allow it to rule on legal issues of first impression, clarify the law in commonly encountered scenarios, and prevent retrials before they become necessary. Be sure to keep this pragmatic bent in mind when filing your own mandamus petitions.

How to petition for mandamus?

First and foremost, remember that you may need to request a stay or pursue appellate remedies at the same time you petition for mandamus.

Second, get your terms for the parties right. The party petitioning for a writ is the "relator," and the relator's opponent from the circuit court is called the "adverse party." Do NOT name the circuit court itself or the judge as a party, even if the judge's action is the true target of the petition. ORS 34.250(2). Some of the older case law differs in this regard, but that is because the law has changed. Follow the statutes on this instead of the old case law.

Third, follow the unique pleading and service requirements very carefully. The legislature has set those steps out in detail in ORS 34.130–140. *See also* ORAP 11.05.

Fourth, understand the difference between an alternative writ and a peremptory writ. *See* ORS 34.150. Most successful mandamus petitions first result in an alternative writ, giving the circuit court the opportunity to change its challenged ruling and allowing an explanation why it should not do so. A peremptory writ is a final decision that directly commands a particular action.

Fifth, craft your petition carefully as if it was an actual pleading that requires a plain and concise explanation of the facts for the underlying dispute. *State ex rel. Venn v. Reid*, 207 Or 617, 623 (1956).

Finally, do not be afraid of the process! It may seem daunting at first, but you can do this. Perhaps you have never argued in front of an appellate court before—arguing for a writ of mandamus before the Oregon Supreme Court could be a fantastic and exciting introduction to appellate practice.

Winning More by Losing Less: Predictable Emotional Patterns When We Lose

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Editor's Note: This is the third in a three-part series exploring winning and, more importantly, losing cases and how we as advocates and counselors for our clients can integrate losses in ways that will motivate and position us for future wins.


William A. Barton

When we lose anything of emotional value, be it a case, our health, a loved one, or anything else of importance, we grieve and ultimately must learn to pick up the pieces and stumble forward. With reflection, you'll discern a pattern to these emotions. Let's review some of the predictable steps along the grieving process. They include anger (externalizing), bargaining, depression, and finally acceptance.[1] These aren't exact stops on a horizontal pain line, but are parts of an arcing emotional framework that can help us better understand our feelings.

1 Kubler-Ross, Elizabeth, "Five Stages of Grief," https://grief.com/the-five-stages-of-grief/.

Anger

Let's start with anger. Oddly enough, it's actually your friend. At a primitive level it's designed to keep you alive. Pain always lurks just beneath the surface of anger. The more the anger, the more the pain, and vice versa.[2] This pain probably goes back a long way, maybe even into your childhood. Anger provides you with an emotional bridge that helps you process your losses and attendant feelings.

Then comes "the blame game"

After a loss in court, it's natural for me to shift into what I call "the blame game." This has both an external and an internal component. When I was younger, I always started by externalizing causation, meaning I searched for reasons outside myself to explain why I lost. It might be the judge, an underhanded opponent, or perhaps even a dumb jury. As natural as the blame game is, I now do my best to avoid all its external expressions. I view all such problems like a fireman who complains about smoke and fires.[3]

Now I choose to internalize attribution and refuse to blame anyone but myself for my loss. Don't get me wrong, many external factors may well have contributed to the outcome; however, now my question is: "What could I have done better to anticipate and address these external factors and thereby have improved my client's chances of winning?" In other words, while I know the loss may not have been my fault, I believe it's most productive to focus on believing it was my fault and then work backwards from there. Why? Because this keeps me focused on the only thing I can control, meaning me. Complaining about district attorneys who overcharge, cops who lie, a sneaky opponent, a biased judge, or how insurance companies have stacked the deck with tort reform propaganda and legislation does no good. Even if true, I consider it a waste of my valuable time.

There's another, even larger, reason why I keep the focus on myself. It invites me to believe I can do better next time. Any other view paints my client and me as powerless, and then we really are victims. I refuse to be a victim. When I really am helpless, then I have no power, and I end up feeling sorry for myself, and that's never productive.

Then comes the "if only" game

Let's consider how excessive internal attribution can become destructive. Remember the progression of our grief feelings? Guilt is the bargaining stage's inevitable companion. Here we end up playing the "if only" game by continually searching for and finding some fault with our services that explains why "we failed." We become stuck vacillating between guilt, pain, anger, and depression. After beating up yourself, it's time to let it go. How much is enough? At this stage of my career, it's about two days; when I was younger it was certainly more. Beneath this emotional roller coaster is the necessity for each of us to invest in a more insightful and healthy future relationship with ourselves.

It is appropriate to pause here and reread Spence's comments on the high price of success, and consider how the fear of losing has driven him. How about you? Where do you weigh in on the "high price of success"? I've shared my triaged view; now it's your turn. Do I, or you, demand enough from ourselves? How do you think clients would weigh in on this question? My bet is they'd uniformly want a lawyer obsessed with avoiding losing. Don't you agree?

Managing expectations—informed consent letters are a tool for your client and you

We obviously have some cheerleading responsibilities. Clients and jurors can smell fear and sense confidence. As lead counsel you are always being watched. Your attitude is contagious. You're responsible for managing expectations for both your client and yourself. I distinguish internal messaging with our clients, and external messaging with all others, including the jury, judge, and opposing counsel. All internal transmissions must be 100% truthful and accurate. During the first interview you should explain what you can (effort) and can't (results) sell. With the external, I always put my best foot forward while projecting optimism and confidence. Measured concerns or fears are healthy counterpoints to excessive confidence. They're at the intersection of judgment and risk tolerance, somewhere near the crossroads of caution and confidence. Cautious optimism is probably a good balance.

Informed consent letters serve as natural brakes on my patriotism. They force me to identify all the bad things that might happen and discuss the (PAR) procedures, alternatives, and risks. We write them in case we lose; you don't need them when you win. We know the rules—we're the agents; the clients are the principals. All this goes into a composite called risk assessment. We provide clients our recommendations; then they make the final decisions.

Attribution or causation when we win

We've talked a lot about losing, so, what if "I" win? For me, the question is always: "How could I have received a quicker or bigger verdict?" It's my sense that many of "our" wins, rather than being the result of our conspicuous legal gifts, are more our opponents' losses. I already talked about how we should take "credit" for the self-marginalizing contributions we make to our losses; however, when it comes to "our" wins, it's more about our opponents' mistakes than our great lawyering. Note, however, it's incumbent upon you to take full advantage of your opponent's mistakes. This is the big idea behind Rick Friedman's *Polarizing the Case*.[4] Do I enjoy my wins; do I take the time to savor them? Yes, for about one day; then I'm back at work.

Effort and results

Let me share my gestalt of life. There are two large variables: effort and results. I'll illustrate with an oversimplification. Effort and results are two components that can produce four combinations:

2 Spence, Gerry, *Go Win Your Case*, Ch. 6, "The Dangerous Power of Anger," p. 60-65.

3 Friedman, Rick, *On Becoming a Trial Lawyer*, Trial Guides (2008), p. 214.

4 Friedman, Rick, *Polarizing the Case*, Trial Guides (2014).

Win / Best Effort ⟷ Win / Less than Best Effort

Lose / Best Effort ⟷ Lose / Less than Best Effort

The preferred combination is obviously doing your best and winning; however, everyone knows we can give it our best and lose; that happens. Or, give less than our best, get lucky and win. It's easy when we win, deserved or not. It's the losses that are the problem. This partially explains why I work so hard and always try to do my best. It makes the losses a little more tolerable.

My intellectualizations and mind games

My personal application of the following two tenets are uneven but I try.

1. I attach to my effort, not the result.

Apart from the fact that I can't guarantee a win, I wouldn't believe in any system where the outcome was decided by the lawyers or wishes of the parties. It's the facts and the law, and it should be.

Portland trial consultant Sari de la Motte explains this nicely:

"Out of all the advice I give, this often gets the most push-back. When I tell attorneys they need to let go of winning, they accuse me of telling them to not care, to turn into a robot, or to do less than their best. Nothing could be further from the truth.

"Think about this in terms of cross exam. We get attached, don't we? We really want to show the jury what a liar this guy or gal is. So we make it personal. We get snarky. We get rude. We say sarcastic things. All of which do nothing for our case. We're too attached. We think this is personal when it's not.

"I brought this up in a seminar a few years ago when an attorney said, 'But we're defending the truth! It just makes me so mad when they lie!' I said, 'The truth needs no defense. It needs a voice.' The minute you attempt to defend, you're attached.

"So how do you know if you're attached to the outcome? Well, anger is a really great indicator. The more attached we are to something, the more angry we get when things don't go our way.

"This is really dangerous for trial attorneys. For two reasons. One, anger clouds our judgment. We don't make good decisions when we're angry and trial is all about making good decisions. Two, anger communicates to the jury this is personal. When it's personal, you're asking the jury to award you a verdict, not your client. There is no jury on the planet willing to award you, a plaintiff attorney, a verdict.

"Here's the truth: you can really care about your client and still let go of winning. You can prepare and do your absolute best and still let go of winning. You can really, really want to win and still let go of winning. You not only can, but you should.

"Winning is out of your control. You can do everything possible to win, but ultimately you have to let go and just be in the moment, which is where you have the most power.

"The more you focus on winning, the more you communicate to jurors you'll do ANYTHING to win. Don't you think jurors already think this? They think you'll lie, cheat and steal to get a verdict. Sending out that energy can only hurt you, not help.

"How attached are you to 'winning?' Can you let go of the outcome and be at peace with the here and now? I promise you if you can let go you'll find you have more energy to put toward the present moment where you have the most power."[5]

2. I try to always do my best; that way I can live with a loss.

I already mentioned this; however, the better question lurks beneath my promise to "always do my best." What exactly does "always" and doing "my best" really mean? At the end of the day, it honestly means me doing my "reasonable best" or "situational best." By this I am acknowledging that everything in life is a triaged choice, the idea of a middle ground. There are unending, competing demands in our lives, ranging from other cases, kids to be dropped off at school, marriages, sickness, and debts, etc., etc., etc. There are only 24 hours in a day, seven days in a week, etc. I'm particularly sympathetic to overworked and underpaid public defenders and single parents. If I'm personally satisfied with the level of my preparation, effort, and choices then it's not fair to me to later continually keep beating myself up. Am I grading my reasonably "best" effort on a sympathetic curve, or am I just human and living in the real world? We each must answer that for ourselves.

Remember, the verdict is decided by the jury, not me or my client. It's analogous to athletes "leaving it all on the field." Again, the question is, "what is my all?" I think here of Atticus Finch in Harper Lee's book, *To Kill a Mockingbird*, and the wrongful guilty verdict against his client Tom Robinson.

Emotional discipline, i.e., focus and compartmentalization

Athletic competition teaches mental discipline; I call it focus or compartmentalization. In basketball, if you're fouled in the act of shooting, you receive two free throws. If you miss the first, then you must put it completely out of your mind as you prepare for your second shot; otherwise, the past becomes a prologue for the future. Clean-up hitters in baseball also lead the majors in strikeouts. Think of field goal kickers in football.

We must learn to relax in the most stressful of circumstances. I slow down, breathe slowly and deeply, while focusing only on the immediate task at hand. I don't think about all the bad things that might happen. Otherwise, the fear of failure can consume me and brings to pass the very thing I fear.

It is important to grieve with your client

I've found losses often bring my clients and me even closer. They had someone in their corner who believed in them and fought for them. Our ship may have gone down, but they didn't go down alone. It's part of our shared journey; however, I force myself to maintain some boundaries. I promptly conduct a searching post-mortem after both losses and wins, and then and only then move on. Wallowing in any more guilt or

5 de la Motte, Sari, *Sidebar* (a publication of the Oregon Trial Lawyers), January-February 2018, p. 5.

depression, glee or celebration keeps me from preparing for my next case, and that is not fair to my next client.

Consider creating a "box of losses"

You may want to buy a small wooden box which symbolically is a crypt for you to figuratively "bury" your losses in by solemnly placing the verdict into your crypt or box of losses. You may want to include your client's photo or a memorable exhibit. This helps me bring closure or emotionally bracket the experience, and thus move on. If this feels a bit like funeral, in a sense, it is. I'm sure I've probably needed a bigger box than you will.

Create a book of past trial results analyzing cause and effect

Keep a three-ring binder with a new page or insert for each trial, win or lose; then impose upon yourself the responsibility of generating insightful explanations for the outcome, meaning "your" results. Ask yourself: "How was I a jury contaminant, be it positive or negative?" It's difficult to be objective when you're both an observer and the subject of observation. This is because you're "grading your own paper." Inviting the opinions of patriotic critics and the judge's observations can help. Yes, I also ask my opponents.

For some, generating and maintaining "crypts" or books may keep the past too close for comfort. I don't have that problem. I work to remember my losses and my wins equally. It keeps me grounded.

Instead of a post-mortem, consider a pre-mortem

Move the time you put into post-trial autopsies into pre-trial preparation asking: "Why might I lose?", "How can I avoid or minimize my anticipated problems?", or "How can I make something good better?" Of course we should be doing this anyway; however, structurally thinking about this as a pre-trial process nudges us into preparing earlier and better.

Step back, examine your habits and patterns

My enduring hope is not to repeat any mistake twice, albeit in different form. The difficulty is identifying the same basic problem in its different forms and expressions. By the way, we're terrible at detecting our self-marginalizing behaviors. Step back from your work and reflect upon your habits. Can they be improved upon? How? Again, welcome the opinion of others.

Be creative

Have you ever thought of yourself as an artist in the medium of the law or as a social architect? Bringing your creativity to trials can be a source of personal nourishment. Prepare demonstrative exhibits that really communicate, conduct your own focus groups, commit yourself to finding better lay damages witnesses. Are there additional instructions that can help? Try my qualitative damages arguments rather than the traditional quantitative or subtraction approach.[6] Have the plaintiff testify in first person during direct exam. Think about the paragraph method of direct.[7] What's your trial story and from whose perspective are you going to tell it? There are no rules saying everything must be chronological, and this includes both the order of your exhibits (your first 5 exhibits should tell your trial story) and where you're going to start your trial story. Remember the power of scene setting.

Generate a reading list of contemporary legal thinkers. Rick Friedman's *Rules of the Road*, Don Keenan and David Ball's *Reptile*, David Wenner's (along with other authors) *Winning Case Preparation: Understanding Jury Bias*, and Keith Mitnik's *Don't Eat the Bruises* with its integration of jury selection, opening and direct exam, all make seminal contributions to current thinking. I especially want to commend *The Zen Lawyer: Winning with Mindfulness*.[8] This model emphasizes the best of thoughtful commitment without inefficient attachment. Apply to the Trial Lawyers College.[9] If you don't have the time, do one of their weekend workshops. Study psycho-drama. Study and grow; take others' suggestions and make them your own.

Consider thereapy

Remember Spence said one of the best reasons for being a trial lawyer is to learn about yourself. If you're not inclined to introspection and self-exploration, then you can skip this section. Gerry Spence,[10] Rick Friedman,[11] and Don Keenan[12] all agree that personal therapy will help. Therapy will improve your insights and assist you self-assessment. Therapy will help you trace the origins of your dysfunctional emotional habits, help identify your emotional triggers, and develop specific strategies for replacing these harmful behaviors with new and effective responses. Your family and loved ones will be beneficiaries of your growth, as will your clients, but you'll be the biggest winner.

Counseling will help you be more in the present. You don't have to be a broken record driven by your past. You may end up making the same decisions; however, after therapy, they will be thoughtfully made in the present, rather than being driven by the emotional scars you were branded with long ago. Where you started in life isn't your fault; where you end up belongs to you.

Most lawyers enter therapy armed with lots of exit strategies. Remember, therapy isn't about fixing anybody else; it's about you and your growth, not your spouse's, kids', lying opponents', or a mean-spirited judge's. It's about you, helping yourself to better understand "why you continue to do what you do," and exploring what your current alternatives might be. Sure it's tough. Freud said all therapy can do is exchange neurotic misery for the misery of everyday life.[13] It's common to initially criticize your therapist, i.e., "We don't click; she

6 Barton, William A., *Recovering for Psychological Injuries*, 3rd Ed., Trial Guides (2010), Ch. 1, "Quantitative v. Qualitative," p. 17-33.

7 McElhaney, Jim, *Trial Notebook*, 3rd Ed. (2006), p 412, 422.

8 Leizerman, Michael, *The Zen Lawyer: Winning with Mindfulness*, Trial Guides (2018).

9 https://www.triallawyerscollege.org/

10 Spence, Gerry, *Win Your Case* (New York: St. Martin's Griffin, 2005), "The Power of Discovering the Self," p. 12-18.

11 Friedman, Rick, *On Becoming a Trial Lawyer*, Trial Guides (2008), "Therapy," p. 160-169. "Of course, you are shackled to yourself—to your own psychological wounds that caused you to become a trial lawyer in the first place. Those wounds give you energy and motivation. They can also be your undoing."

12 Keenan, Don, *The Keenan Edge*, Balloon Press (2012), p.13.

13 https://geopolicraticus.wordpress.com/2009/08/06/neurotic-misery-ordinary-human-unhappiness/.

doesn't listen to me; she doesn't get it; or she's not helpful . . . " This might be true; however, perhaps you're just not yet ready for change. "When the student is ready a teacher will appear."[14] And yes, sometimes we have to hit bottom and crash before we're willing to make serious changes and, by the way, self-pity isn't much of a personal investment.

Social justice and perspective—taking the long view

We jury trial lawyers are social architects and engineers of the common law. In my early Catholic Church cases no one could or would believe Father O'Malley was motivated by less than the best of intentions. Back then mentioning priests and pedophiles in the same sentence was heresy. Think here of the "first free bite" in dog bite cases. No one wants to believe that Bill Cosby, the nation's grandfather, was drugging women for sex. Society's long march toward justice is uneven and lumpy and, yes, we're all part of it.

Gaining and maintaining a longer perspective of your career and life is essential. Step back—I know every recent loss feels huge; remember, however, that we're all part of this long and dynamic historical process. The common law never moves in straight lines.[15] While it's nice to receive social affirmation and an occasional pat on the back, we can't count on it. The warmth of the herd is too faint and irregular. We feel very alone. This is why we must learn to become self-nourishing, self-affirming, and find a longer career and life lens from which to view our work and thus ourselves. This improves our likelihood of enjoying work, staying healthy, remaining optimistic and, yes, winning more.

I'm always inspired by the story of the three bricklayers: A traveler came upon three men laying bricks. He asked the men what they were doing. The first said he was laying bricks, the second replied he was putting up a wall, while the third said he was building a cathedral. They were all doing the same task. The first had a job, the second a career, and the third a calling. Keep looking for the big picture in your employment. The alternative is the fate of Sisyphus: forever rolling the stone uphill. Your attitude is a choice.

Another helpful shift in perspective when advocating is to "judge acts, not people." This both helps you stay on the high ground and helps keep things from getting personal. You stay mindfully centered, so your opponent doesn't dictate your behavior. Instead of reacting, you respond. Sari de la Motte's earlier advice on attaching to your effort and not the result also applies here.

Write your obituary

What's your life story? What would you like it to be? If you could write your own obituary, what would you want it to say? Of course, that "you loved, and were loved. That you had a certain sparkle, sense of humor, and gave more than you took." What would you want it to say about your work, if anything? How did you approach it; what did it mean to you? What was your vocational legacy? What might it be? What would you like it to be? You can start living it right now.

14 Buddhist proverb.

15 The arc of history bends toward justice.

RECENT SIGNIFICANT OREGON CASES

By Stephen K. Bushong
Multnomah County Circuit Court

The Honorable Stephen K. Bushong

Claims and Defenses

McCormick v. State Parks and Recreation Dept., 366 Or 452 (2020)

Plaintiff was injured while swimming in Lake Billy Chinook. He sued the state for negligence. The trial court granted the state's motion for summary judgment, concluding that it was entitled to recreation immunity under ORS 105.682. The Court of Appeals reversed, concluding that the state did not "permit" recreational use of the lake as required for recreational immunity under the statute because the public already had a right to use the lake under the public trust and public use doctrines. The Supreme Court reversed the Court of Appeals, concluding that "an owner can 'directly or indirectly permit' the use of its land for the purposes of the recreational immunity statutes, even if the public already has a right to use the land for that purpose." 366 Or at 473. The state "made Lake Billy Chinook accessible for recreation" by, among other things, "develop[ing] and maintain[ing] day use areas and facilities for recreating in the lake, including facilities for boating and swimming." *Id.* at 474. "Through its actions, the state 'permitted' public recreation use for the purposes of ORS 105.682." *Id.*

Eddy v. Anderson, 366 Or 176 (2020)

Plaintiffs (landlords) sued defendants (tenants) to recover unpaid rent. Tenants counterclaimed for damages under the Oregon Residential Landlord and Tenant Act (ORLTA), alleging that landlords failed to maintain the premises in a habitable condition. The trial court granted landlords' motion to dismiss the counterclaims, concluding that tenants acted with "unclean hands" because they failed to give landlords written notice of the alleged violation. The Court of Appeals affirmed on somewhat different grounds, concluding that tenants' counterclaim was barred by ORS 90.130 because they failed to act in good faith. The Supreme Court reversed. Construng the statute, the court concluded that "good faith" in ORS 90.130—defined as "honesty in fact" in ORS 90.100(19)—"turns on a party's subjective intentions." 366 Or at 188. Whether or not a party's actions "meet an objective standard of 'reasonableness'—or are 'unpleasantly motivated'—is irrelevant." *Id.* (citation omitted). The court further concluded that "neither ORS 90.360(2) nor ORS 90.370 requires written notice . . . for a tenant's counterclaim under ORS 90.360(2)." *Id.* at 193.

Jones v. Four Corners Rod and Gun Club, 366 Or 100 (2020)

Plaintiff agreed to provide maintenance and groundskeeping work in exchange for free lodging in a mobile home on the premises of defendant Four Corners Rod and Gun Club (Club). Plaintiff worked and lived at the Club for three years. After the Club terminated his employment and evicted him from the mobile home, plaintiff sued for unpaid minimum wages, civil penalties and attorney fees. The Club admitted liability on the wage and statutory penalty claims. The Club asserted a "setoff" defense based on the value of the lodging benefits, and equitable counterclaims premised on the theory that plaintiff would be unjustly enriched if he was allowed to recover wages in addition to the value of the lodging benefit. At trial, the jury found that plaintiff had earned a minimum wage of $38,796, and that the value of the lodging benefit provided by the Club was $43,403. The Supreme Court concluded that the Club's "unlawful withholding of wages prevents it from asserting the value of the lodging benefit as an affirmative defense to defeat plaintiff's wage claim but does not prevent [the Club] from asserting an equitable counterclaim for the value of the lodging benefit." 366 Or at 102. However, the court further concluded that "the equitable recoupment to which [the Club] is entitled for the value of the lodging benefit is limited to the value of the wages to which the jury found plaintiff is entitled for his labor." *Id.* at 126. As for the attorney fee claims, the court explained that, "in a wage action with both claims and counterclaims, the trial court must separately calculate all of the wages, penalties, interest, and attorney fees due on the plaintiff's claims, and all amounts due to the defendant on the counterclaims." *Id.* "Only then is it appropriate to compare the two recoveries and identify the party to whom a net money award is due." *Id.*

Towner v. Bernardo/Silverton Health, 304 Or App 397 (2020)

Plaintiff alleged that Dr. Peter Bernardo negligently performed laparoscopic surgery on her at Silverton Hospital. Bernardo had staff privileges at the hospital but was not a Silverton employee. The trial court granted defendant Silverton's motion to dismiss the negligence claim against the hospital, concluding that the "peer review" privilege in ORS 41.675(3) precluded plaintiff from pursuing her claim that Silverton negligently "credentialed" Bernardo by giving him surgical privileges at the hospital. The trial court granted defendants' motion for summary judgment on the vicarious liability claim, concluding that Silverton could not be vicariously liable for Bernardo's negligence because he was not the actual or apparent agent of the hospital. The Court of Appeals reversed those rulings. The court, noting the "lack of evidence in the summary judgment record of Silverton Health's right to control Bernardo's surgical practice," concluded that "a reasonable factfinder could not conclude that Bernardo was an actual agent of Silverton Hospital in performing plaintiff's surgery." 304 Or App at 408. The court further concluded that the trial court erred in granting defendants' motion for summary judgment on plaintiff's apparent agency theory of vicarious liability because a reasonable factfinder could find that (1) Silverton "held itself out as the direct provider of plaintiff's care" (*Id.* at 416); (2) plaintiff "relied on that manifestation when she elected to have Bernardo perform her surgery at the hospital" (*Id.*); and (3) the hospital "appeared to have a right to control Bernardo in his surgery on plaintiff." *Id.* Without reaching the issue of whether plaintiff "might still be foreclosed in pursuing [the negligent credentialing and supervision] claims following a more developed record on summary judgment, the court further concluded that the trial court erred in dismissing the negligent credentialing claim against Silverton. *Id.* at 424. Finally, the court concluded that the trial court did not err "when it granted Silverton Hospital's motion to strike plaintiff's allegation that the hospital had a nondelegable duty to ensure quality care under ORS 441.055 and, as a result, was liable for Bernardo's conduct." *Id.* at 429-30.

Bank of New York Mellon v. Brantingham, 303 Or App 649 (2020)

Bank of New York Mellon v. Lash, 303 Or App 456 (2020)

In *Brantingham*, the Court of Appeals rejected defendants' argument that plaintiff Bank was not entitled to foreclose the trust deed securing the underlying loan because Bank failed to prove that it was entitled to enforce the promissory note evidencing the debt. The court explained that "a holder is entitled to enforce a negotiable instrument, regardless of whether the holder is the owner of the instrument." 303 Or App at 660. In *Lash*, the Court of Appeals, on reconsideration of its earlier decision (reported at 301 Or App 658), concluded—contrary to its earlier opinion—that an FED action was "available to plaintiff as the post-foreclosure purchaser of the premises, despite the fact that the parties lacked a landlord-tenant relationship." 303 Or App at 459. The court withdrew its earlier opinion in this case. *Id.* at 460.

Sherman v. Dept. of Human Services, 303 Or App 574 (2020)

Plaintiff alleged that the Department of Human Services (DHS) negligently failed to protect her from being abused in foster care. The trial court granted DHS's motion to dismiss, concluding that the claims were time barred by the 10-year statute of ultimate repose, ORS 12.115, because the exception to the statute of ultimate repose provided in ORS 12.117 is superseded by the Oregon Tort Claims Act (OTCA), ORS 30.275 (9). The Court of Appeals reversed, holding that "ORS 30.275(9) does not supersede the exception to the statute of ultimate repose in ORS 12.117[.]" 303 Or App at 576.

Ram Express v. Progressive Commercial Casualty Co., 303 Or App 211 (2020)

Plaintiff won a truck at a salvage auction in February 2014; paid for it in March; took possession on June 17; and notified the insurance company that day that it had acquired the truck. A fire destroyed the truck on June 18. The insurer denied coverage, and plaintiff sued. The trial court granted the insurer's motion for summary judgment, concluding that the plaintiff could not show that it notified the insurer within 30 days of acquiring the truck, as required to obtain insurance coverage under the policy. The Court of Appeals reversed, concluding that the record "allows an inference that plaintiff bought the truck on June 17, when it first had possession plus a legal right to the truck." 303 Or App at 217.

Phillips v. State Farm Fire and Casualty Co., 302 Or App 500 (2020)

Plaintiff kept approximately 100 cats in her apartment. Her landlord sued its insurer, State Farm, contending that damage caused by the "permeating odor" from cat urine and feces was covered property damage under State Farm's rental dwelling policy. State Farm denied coverage, citing a policy exclusion for loss "directly or immediately caused by" domestic animals. The trial court granted State Farm's motion for summary judgement, concluding that coverage for the property damage was excluded as a matter of law by the domestic animal exclusion. The Court of Appeals affirmed, rejecting plaintiff's argument that the "permeating odor" damage was caused, through the passage of time, by the tenant's negligence. The court explained that "the elimination of feces and urine by domestic animals onto the insured's rental property is damage that is excluded from coverage[.]" 302 Or App at 507. The passage of time and tenant's failure to take action "may well make matters worse, but the cats caused the damage. It is therefore excluded under the policy." *Id.*

Summa Real Estate Group, Inc. v. Horst, 303 Or App 415 (2020)

In this business dispute tried to the court, the Court of Appeals determined that the trial court erred in awarding plaintiffs lost profits on their claim for intentional interference with contract, economic relations, and prospective business advantage. The court explained that, "when a party seeks to recover lost profits, it must prove *net* lost profits." 303 Or App at 424 (emphasis in original). Here, plaintiffs submitted evidence of gross revenues, but the trial court excluded evidence offered by defendants of the expenses necessary to generate those revenues because defendants "had failed to persuade the court that those expenses were legitimate." *Id.* "The problem with that approach," the court explained, "is that proving lost profits is not a burden-shifting exercise." *Id.* "It is not a situation in which the plaintiff has the burden to establish lost gross revenues, and then the defendant has the burden to establish the related expenses, so as to allow the factfinder to calculate net profits. Rather, the burden of proving lost profits, *i.e.*, *net* lost profits, is entirely on the plaintiff." *Id.* at 424-25 (emphasis in original).

Kelley v. Washington County, 303 Or App 20 (2020)

Plaintiff alleged that he was terminated from his job as a community corrections officer because of his disability, obesity. Defendants responded that they discharged plaintiff for a nondiscriminatory reason: he was unable to run in response to emergencies, an essential function of the job. At the time of his termination, plaintiff weighed approximately 600 pounds. The trial court granted defendants' motion for directed verdict at the close of trial, concluding that running was an essential job function, and that plaintiff failed to offer any evidence that he was able to perform that function. The Court of Appeals reversed. The court agreed with defendants that "the record permits no other conclusion than that running in response to emergencies is an essential function of the specialist position." 303 Or App at 31. However, the court concluded that plaintiff "did present some evidence to support the finding that he could respond to emergencies by running short distances, such that a directed verdict would not be proper." *Id.* at 34.

NV Transport, Inc. v. V & Y Horizon, Inc., 302 Or App 707 (2020)

Plaintiff NV Transport, Inc. (NV) is a licensed motor carrier in the business of freight transport. One aspect of the business—known as "drayage"—involves transporting freight over short distances, such as from a shipyard or railyard to a warehouse. Plaintiff entered into a contract with defendant Vitaliy Fogel (Fogel) and his company, defendant V & Y Horizon, Inc. (V & Y), to work on commission as NV's drayage dispatcher. Later, Fogel sent an email to one of NV's customers stating that V & Y would take over the drayage work, and that he was leaving NV because he and NV "see best business practices and ethics **diametrically differently**" and urging the customer to "read between the lines." 302 Or App at 709 (emphasis in original). NV eventually sued, asserting, among other claims, claims for intentional interference with economic relations and defamation *per se*. The trial court granted defendants' motion for summary judgment on those claims, concluding that the intentional interference claim failed for lack of proof of improper motive or means, and that the defamation claim failed because there was no evidence in the record of communications that were defamatory *per se*. The Court of Appeals reversed. The court concluded that there was evidence in the record sufficient to create a genuine issue of material fact on the first claim because the evidence would permit a jury to find that, in order to divert NV's business opportunities to V & Y, Fogel "misappropriated plaintiff's own equipment, employees, and drivers, misrepresented that plaintiff would no longer be in the drayage business, disparaged plaintiff's business practices and ethics, and cut off plaintiff's ability to communicate with its drayage customers." *Id.* at 714. On the defamation claim, the court explained that "whether a statement is defamatory focuses on how a recipient would understand it." *Id.* at 715. Here, Fogel's statement "is reasonably susceptible to the implication that plaintiff is unethical or dishonest and does not engage in best business practices. If untrue, that implication would be defamatory *per se*." *Id.* at 716.

Procedure

Portfolio Recovery Associates, LLC v. Sanders, 366 Or 355 (2020)

Plaintiff Portfolio sought to recover a credit card debt from defendant Sanders, asserting a common-law claim for an "account stated." The trial court granted Portfolio's motion for summary judgment, concluding that (1) Portfolio was entitled to summary judgment on the merits of the account-stated claim; and (2) the claim was not barred by Virginia's statute of limitations, as Sanders contended. The Court of Appeals reversed, concluding that neither party was entitled to prevail on summary judgment. The Supreme Court affirmed the Court of Appeals. On the choice-of-law issue, the court explained that "Sanders points to no difference between the account-stated law of Virginia and the account-stated law of Oregon that could create a conflict of consequence to the substance of

Portfolio's claim." 366 Or at 375. Under those circumstances, an Oregon court should apply Oregon law. On the merits, the court concluded that "genuine issues of material fact preclude Portfolio from demonstrating that it is entitled to summary judgment on the merits of its account-stated claim." *Id.* at 381.

C.O. Homes, LLC v Cleveland, 366 Or 207 (2020)

Plaintiff landlord brought this forcible entry and detainer (FED) action to recover possession of a residential dwelling unit, alleging that it was entitled to possession based on a 72-hour notice for nonpayment of rent. After tenant appeared and filed her answer, two days before trial, landlord moved to amend its complaint under ORCP 23 to rely on a 30-day notice of termination "for cause." The trial court granted the motion; the Supreme Court reversed, concluding that the trial court abused its discretion in allowing the amendment. The court explained that the amendment "substantially changed the operative facts on which [landlord's] claim was based." 366 Or at 220. Tenant was prejudiced by the late amendment because (1) "tenant had insufficient time to address" the new claim (*Id.* at 221); and (2) the motion "came after tenant had filed her answer contesting the action and exposing her to potential liability for attorney fees." *Id.* The court concluded that the trial court abused its discretion because it "failed to recognize that landlord's claim had changed and that tenant would be unduly prejudiced by that change." *Id.*

Lacey v. Saunders, 304 Or App 23 (2020)

Plaintiff failed to substitute the personal representative of the defendant's estate after he died within 30 days of notice of death, as required by ORCP 34 B. The trial court granted the personal representative's motion to dismiss and entered a dismissal without prejudice. The Court of Appeals reversed, concluding that "ORCP 34 B acts as a time limitation, providing the exclusive procedural means through which a claimant may continue an action that began before the defendant's death. As a result, the trial court must grant a motion to dismiss with prejudice based on a claimant's failure to adhere to the rule's time limitation." 304 Or App at 27.

Wright v. Turner, 303 Or App 759 (2020)

Plaintiff was riding as a passenger in a truck that collided with two separate vehicles in short succession. She sought to recover personal injury damages from her insurer under the underinsured motorist (UIM) coverage provided by her automobile insurance policy. The policy limited the insurer's liability to $500,000 per accident. At trial, the parties disagreed about "which party bore the burden of proving how many accidents occurred, and in turn, how much in damages should be apportioned per accident." 303 Or App at 765. The trial court instructed the jury that, if plaintiff established that her injuries could not be apportioned between the two accidents, the burden shifted to defendant insurer to prove the appropriate apportionment. The jury found that two accidents occurred within the meaning of the policy, and that it could not apportion the damages between each accident. The court entered judgment awarding the entire amount of damages plaintiff requested. The Court of Appeals reversed. The court concluded that "the trial court erred by placing the burden of proving apportionment on defendant, and further erred by not requiring the jury, if it found that two accidents occurred, to apportion plaintiff's damages per accident." I*d.* at 764. The court remanded "for the limited purpose of having a jury determine how much in damages should be apportioned between the two accidents with plaintiff bearing the burden of apportioning the damages per accident." *Id.* at 769.

Deep Photonics Corp. v. LaChapelle, 303 Or App 699 (2020)

Plaintiffs brought shareholder derivative claims against three corporate directors, alleging that defendants breached their duty of care to the corporation and its shareholders. A jury found in favor of plaintiffs and awarded $10 million in damages, apportioned among the defendants. The Court of Appeals affirmed, concluding that the trial court did not err in allowing the claims to be tried to a jury. The court concluded that, under Article I, section 17, of the Oregon Constitution, "the right to jury trial must depend on the nature of the relief requested and not on whether, historically, a court of equity would have granted the relief had the legal issue been joined with a separate equitable claim." 303 Or App at 705-06 (quoting *Foster v. Miramontes,* 352 Or 401, 425 (2012)). Here, plaintiffs "brought a claim that adds a single equitable overlay—the right of the shareholders to bring a claim on behalf of the corporation—to an otherwise legal claim for damages for breach of fiduciary duties." *Id.* at 706. The court concluded that "the relevant 'claim' is the legal claim by the corporation, rather than the easily separated equitable issue of whether corporate shareholders have standing to bring the action on behalf of the corporation." *Id.* at 709.

Porter v. Veenhuisen, 302 Or App 480 (2020)

In this personal injury action, plaintiff requested a postponement of his trial because a recent flare-up of his post-traumatic stress disorder (PTSD) prevented him from leaving his home. Citing the age of the case, the trial court denied the motion to postpone and dismissed the case because plaintiff was not ready for trial. The dismissal was without prejudice. Under ORS 12.220, plaintiff had 180 days to refile the same claim. Plaintiff appealed the dismissal, contending that the trial court abused its discretion in denying the postponement. The Court of Appeals affirmed. The court concluded: "Given the relatively minor burden that dismissal without prejudice imposed on plaintiff, and the 180-day time period to refile, the trial court did not abuse its discretion when it denied plaintiff's motion to postpone." 302 Or App at 484.

Int. Assn. Machinist, Woodworkers Local W-246 v. Heil, 302 Or App 442 (2020)

In this forcible entry and detainer (FED) action, the trial court awarded plaintiff $6,801 in damages on its breach of contract claim against defendant John Heil. Before trial, John Heil served a pretrial offer of judgment under ORCP 54 E for $7,800. The offer did not expressly include or exclude attorney fees or costs. Plaintiff had incurred $1,400.10 in attorney fees and costs up to the time of the offer. The trial court awarded plaintiff costs and attorney fees incurred throughout the litigation, concluding that the damages ultimately awarded ($6,801) plus $1,400.10 in costs and attorney

fees at the time of the offer, exceeded the amount of the offer. The Court of Appeals reversed. The court explained that "the proper comparison under ORCP 54 E is between the offer of judgment, which here includes the right to pursue recoverable attorney fees and costs incurred up to the time of service of the offer, and the judgment, which includes the sum of the award plus those same fees and costs." 302 Or App at 452. Here, the offer ($7,800) plus attorney fees and costs ($1,400.10) meant that, in effect, "the offer was for $9,200.10[.]" *Id.* The judgment was in the amount of $8,201.10 ($6,801 plus $1,400.10). Thus, plaintiff "did not obtain a more favorable judgment" than the offer. *Id.*

Evidence

Miller v. Elisea, 302 Or App 188 (2020)

Plaintiffs brought this personal injury action after plaintiff Sherri Miller sustained a neck injury in a car accident. Plaintiffs intended to call two physicians as expert witnesses who would testify that the physical trauma of the accident caused Sherri's fibromyalgia. After a hearing under OEC 104(1), the trial court excluded the testimony, concluding that plaintiffs had not met the threshold to establish the admissibility of the evidence as scientific evidence because there was no "consensus in the medical community" that physical trauma can cause fibromyalgia. 302 Or App at 191 (quoting trial court). The Court of Appeals reversed. The court explained that "the general acceptance of a theory of causation in the medical community is certainly relevant to the determination of the scientific validity of a theory, but its absence is not disqualifying." *Id.* at 193. Here, plaintiffs' experts "supported their theory that physical trauma can cause fibromyalgia with evidence from their own clinical experience that there is a high correlation between physical trauma and fibromyalgia, peer-reviewed medical literature, and studies describing a possible neurological mechanism of causation." *Id.* at 194. The defense expert testified that "there is no consensus in the medical community" on the issue, and opined that evidence based on patient self-reporting "is unreliable[.]" *Id.* The court explained that the conflicting expert opinions "are relevant but are for the trier of fact to consider in weighing the evidence; they are not dispositive in the court's function as a gatekeeper to admit or exclude expert evidence." *Id.* at 194-95. "Rather, the trial court's function was to determine whether the offered evidence was based on scientifically valid principles. We conclude here that it was." *Id.* at 195.

Miscellaneous

Multnomah County v. Mehrwein, 366 Or 295 (2020)

Multnomah County voters approved Measure 26-184—an amendment to the County's Home Rule Charter—that limited campaign contributions, limited campaign expenditures, and provided for disclosure requirements. The trial court, applying *Vannatta v. Keisling,* 324 Or 514 (1997) (*Vannatta I*), concluded that all three parts of the measure violated Article I, section 8 of the Oregon Constitution. The Supreme Court overruled and disavowed its earlier decision in *Vannatta I*. 366 Or at 322. The court concluded that (1) "the contribution limits are not facially invalid under Article I, section 8" (*Id.* at 332); (2) "the expenditure limits violate Article I, section 8" (*Id.*); and (3) the trial court's conclusion that the disclosure rules violated Article I, section 8, "became moot on appeal," so the court "decline[d] to decide the now-theoretical question." *Id.* at 333.

Linn County v. Brown, 366 Or 334 (2020)

Three counties contended that they were exempt from the requirements of Oregon's paid sick leave statute because the statute required them to establish a new "program" without providing any state funding, in violation of Article XI, section 15 of the Oregon Constitution. The Supreme Court concluded that "the paid sick leave law is not a 'program' for purposes of Article XI, section 15." 366 Or at 354. The court explained that a "program" for purposes of Article XI, section 15, "focuses on 'specified services' that local government is to provide to 'persons, government agencies or to the public generally." *Id.* The paid sick leave law was not a "program" because it "is a statutory policy choice regarding an employee benefit that the legislature determined to be appropriate and that it now requires of all employers—public and private, profit and nonprofit—of a certain size." *Id.*

City of Corvallis v. State of Oregon, 304 Or App 171 (2020)

ORS 222.127 provides that, if certain conditions are met, the legislative body of a city "shall annex" certain territory within its urban growth boundary without submitting the proposal to the city's electors. The cities of Corvallis and Philomath contended that this statue violates the "home rule" provisions of the Oregon Constitution. The trial court found no constitutional violation; the Court of Appeals affirmed (but remanded for entry of a declaratory judgment to that effect). The court rejected the cities' argument that the statute compels them to annex territory against their will, explaining that the cities "are only being compelled to do precisely what their voters provided for when they enacted the charter provisions at issue: comply with state law regarding mandated annexations." 304 Or App at 189.

State/Klamath County v. Hershey, 304 Or App 56 (2020)

Petitioners impounded respondent's animals pending his criminal trial, then brought a forfeiture action under ORS 167.347 when respondent failed to post a bond for the cost of care and treatment for the animals. Respondent contended that, under Article I, section 17, of the Oregon Constitution, he had a right to a jury trial on the forfeiture petition. The trial court disagreed; the Court of Appeals affirmed. The court concluded that the forfeiture claim "is most akin to a lien foreclosure claim in general, which was not entitled to a jury trial at the time of the adoption of the Oregon Constitution, and it does not include the kind of fact finding that would customarily be tried to a jury." 304 Or App at 72.

Anantha v. Clarno, 302 Or App 196 (2020)

Plaintiffs proposed three initiative petitions to amend Oregon's Forest Practices Act. The Oregon Secretary of State rejected each proposed measure, concluding that each one violated the "single subject" requirement of Article IV, section

1(2)(d), of the Oregon Constitution. The trial court upheld the Secretary's determination; the Court of Appeals reversed. The court explained that, as in the measures upheld in *Eastman v. Jennings-McRae Logging Co.*, 69 Or 1 (1914), and *Lovejoy v. Portland*, 95 Or 459 (1920), "it is relatively easy to identify a logical, unifying principle connecting the provisions of each measure: the regulation and protection of forestlands." 302 Or App at 203-04. And none of the measures "share the grab-bag quality" that led the Supreme Court to invalidate the light-rail funding measure at issue in *McIntire v. Forbes*, 322 Or 426 (1996). *Id.* at 204.